148 U.S. 293

RECORD, CASE No. 13,715.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 135.

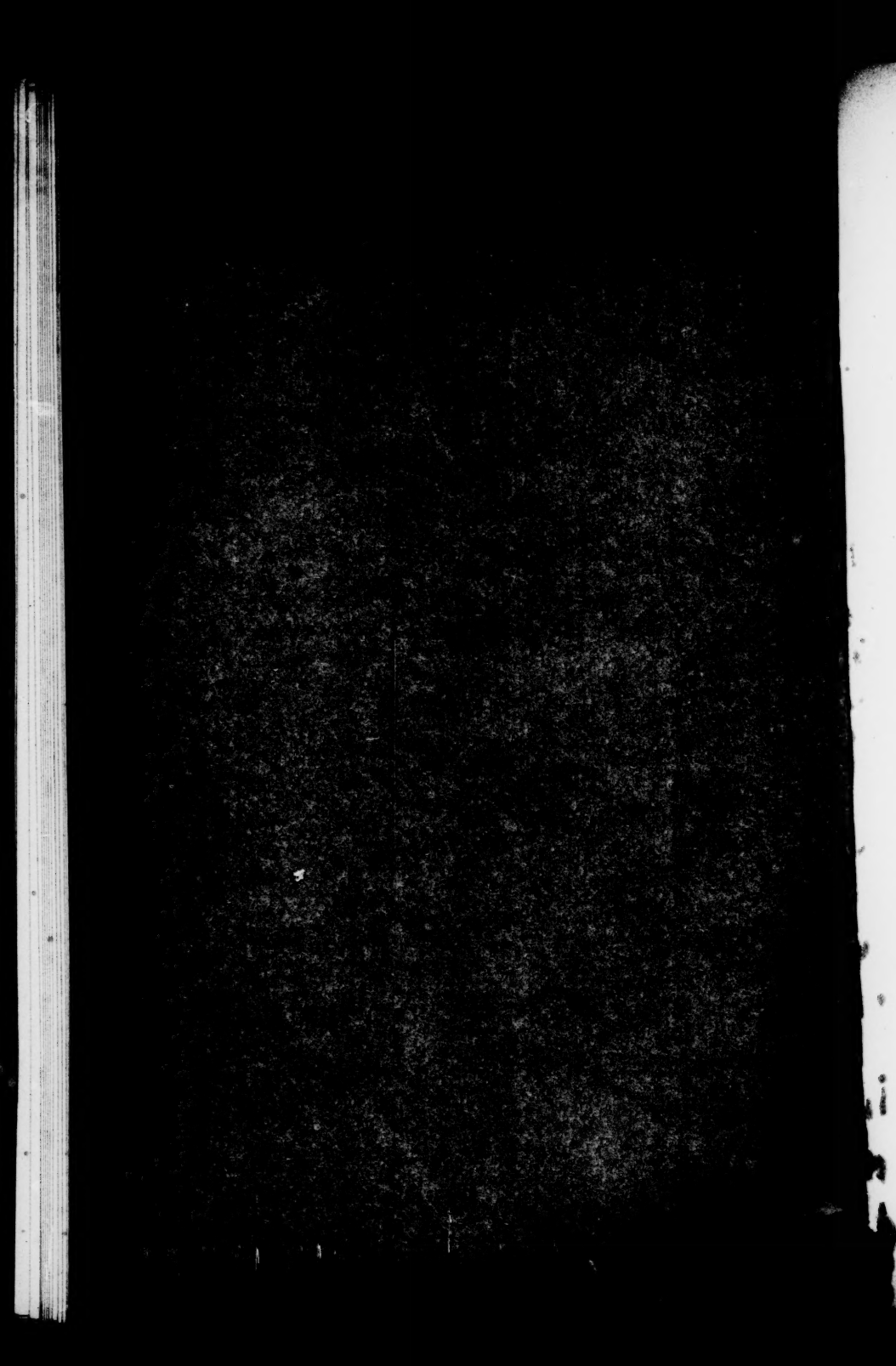
THE WASATCH MINING COMPANY, APPELLANT,

vs.

THE CRESCENT MINING COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED OCTOBER 10, 1889.



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1 In the Supreme Court of Utah Territory.

THE CRESCENT MINING COMPANY, Plaintiff and Respondent,
vs.
THE WASATCH MINING COMPANY, Defendant and Appellant.

Transcript on Appeal.

W. H. Dickson, Bennett, Kirkpatrick & Bradley, attorneys for appellant; R. N. Baskin, E. T. Sprague, P. L. Williams, attorneys for respondent.

Marked filed May 24th, 1888.

(Signed) E. T. SPRAGUE,
Clerk of Supreme Court.

In the District Court of the Third Judicial District of Utah Territory, Salt Lake County.

(Title.)

And now comes the said plaintiff, and by leave makes this its amended complaint, and alleges that said parties, plaintiff and defendant, are, and said plaintiff for more than four years last past and defendant for more than fifteen years last past has been, each a corporation organized and existing under the laws of Utah Territory, authorized to purchase, hold, work, and sell mining claims and property.

2 Plaintiff further alleges that on and prior to the 18th day of October, A. D. 1873, the said defendant was the owner and in the possession of the "Walker and Walker Extension mines" and the "Buckeye mine," situate in the Uintah mining district, Summit county, Utah Territory; that the said mining claims and property lie contiguous; that they have been officially surveyed and patents issued therefor from the United States, and according to said surveys and patents the exterior boundaries thereof, with magnetic variation at 17 deg. 30 min. east, are as follows, viz: Beginning at corner No. 1 of the Walker and Walker Extension mine, and running thence N. 44 deg. 35 min. W. two hundred and twenty (220) feet to corner No. 2 of said mine, from which U. S. mineral monument No. 4 bears S. 46 deg. 10 min. W., at the distance of one hundred and fifty-eight (158) feet; thence S. 21 deg. 15 min. W. one hundred and ninety-six (196) feet to corner No. 3; thence S. 68 deg. 5 min. W. twenty-eight hundred and four (2,804) feet to corner No. 4; thence S. 44 deg. 35 min. E. two hundred and sixteen (216) feet to corner No. 5; thence N. 68 deg. 5 min. E. fourteen hundred and ten (1,410) feet to corner No. 3 of the Buckeye mine; thence S. 44 deg. 35 min. E. along the southerly end line of said Buckeye mine one hundred and thirty (130) feet to corner No. 4 thereof; thence N. 68 deg. and 5 min. E. fourteen hundred (1,400) feet to corner No. 1 of said last-mentioned mine; thence N. 44 deg. 35 min. W. one hun-

dred and thirty (130) feet to corner No. 2 of said Buckeye mine, the same being also corner No. 6 of the said Walker and Walker
3 Extension mine; thence N. 21 deg. and 15 min. E. one hundred and ninety (190) feet to the place of beginning.

That while the said defendant was so the owner and in possession of the whole of the said mining claims as above described James Lowe and others, the owners of the Pinyon and Pinyon Extension mine, applied for and obtained a patent from the United States of said last-named mine, bearing the date the said 18th day of October, A. D. 1873; that the said Pinyon and Pinyon Extension mine, as the same was located, crossed, overlapped, and conflicted with the said Walker and Walker Extension and Buckeye mines, and by mistake and error in the said application the same included a portion of the said Walker and Walker Extension and Buckeye mines, and the said patent to said James Lowe and others so obtained is pursuance of said application erroneously included all that portion of the said last-named mines bounded and particularly described, with magnetic variation as aforesaid, as follows, to wit: Beginning at corner No. 1 of the said Walker and Walker Extension mine, as the same was officially surveyed and patented, and running thence N. 44 deg. 35 min. W. one hundred and ninety (190) feet to intersection of westerly side line of lot No. 42, being the Pinyon and Pinyon Extension mine; thence S. 32 deg. W. 155 feet to intersection of northwesterly boundary line of said Walker and Walker Extension mine; thence S. 21 deg. 15 min. W. along said boundary line 32 feet to corner No. 3 of said Walker and Walker Extension claim; thence S. 68 deg. 5 min. W. 10 feet to intersection of
4 the westerly side line of said lot No. 42; thence S. 32 deg. W. on said line 510 feet, more or less, to intersection with the southerly boundary line of the Buckeye mining claim; thence N. 68 deg. 5 min. E. along said last-mentioned line 339 feet to intersection of easterly boundary line of said lot No. 42; thence N. 32 deg. E. on said last-named boundary line 300 feet to intersection of the easterly boundary of said Walker and Walker Extension claim; thence on said boundary line of the last-named claim N. 21 deg. 15 min. E. 89 feet to said corner No. 1, the place of beginning.

That said portion of the said Walker and Walker Extension and Buckeye mines so included and embraced in the said patent of the said Pinyon and Pinyon Extension mine was at all times known, understood, and recognized by all the owners of and parties interested in each of the said three mines to belong to and constitute a part of the said Walker and Walker Extension and Buckeye mines respectively; that the discovery points of each of the said mines, viz., the Walker and Walker Extension and Buckeye mines, is included within the boundaries of the area last above described and so as aforesaid erroneously embraced within the said patent of the Pinyon and Pinyon Extension mine; that in recognition of the rights of the said defendant to the premises last aforesaid and to correct the errors in the said application and patent the grantees therein afterwards, to wit, on or about the 28th day of October, A.

D. 1874, executed and delivered to the defendant a deed conveying to it and to its successors and assigns the said premises.

5 And the plaintiff further avers that subsequently, to wit, about the year A. D. 1879, William Jennings, since deceased, and Joseph A. Jennings, a son of the said William Jennings, went into the possession of the said Walker and Walker Extension and Buckeye mines, including the said portion thereof so as aforesaid embraced in the said patent of the said Pinyon and Pinyon Extension mine, and claimed to be the owners of the whole thereof, and continued in the possession and occupation of the whole of said premises under said claim of ownership until the 8th day of March, A. D. 1883; that after said William Jennings and Joseph A. Jennings went into the possession of the said property the said defendant, The Wasatch Mining Company, prior to the said 8th day of March, A. D. 1883, brought a suit in the third district court of Utah Territory against the said William Jennings and Joseph A. Jennings and Isaac Jennings, which suit is still pending in said court, and involves the title and ownership of the said mining property and premises.

That heretofore, to wit, on the 8th day of March, A. D. 1883, and while the said action was pending, the said Wm. Jennings and Joseph A. Jennings, for a valuable consideration, to wit, the sum of fifty thousand ($50,000) dollars, executed and deposited with the Deseret National Bank of Salt Lake City a deed, by the terms of which they conveyed to the plaintiff herein, The Crescent Mining Company, the whole of the said Walker and Walker Extension and Buckeye mines, including the portions thereof embraced

6 within the said patent of the Pinyon and Pinyon Extension mine, a copy of which deed is hereto attached and marked Exhibit "A" and made a part hereof.

That at the same time the said deed was executed and as a part of the said transaction and sale the said plaintiff, The Crescent Mining Company, as the party of the first part, and the said Wm. Jennings and Joseph A. Jennings, as parties of the second part, for a valuable consideration to each of the said parties moving, entered into an agreement in writing, in which (after reciting the execution of the said deed and the pendency of the said action) it was mutually agreed by and between the said parties that the said deed and also the said agreement should be deposited in the said bank and there held subject to the terms and conditions contained in the said agreement—that is to say, that whenever and as soon as the said action and the subject-matter of litigation therein involved should be finally determined, if such determination should be favorable to the defendant therein, the said first part- should pay to the said second parties the sum of forty-two thousand five hundred ($42,500) dollars, the balance of the purchase price of the said property, the sum of seven thousand five hundred ($7,500) dollars thereof having been paid at the time of signing said agreement, and upon the payment of the said sum of money the said deed was to be delivered to and accepted by the said first party; that said agreement also contained a provision that if at any time before the final determination

of said action and after three months from its date the said second parties should execute and deliver to the first party their
7 written agreement to save it harmless from all claims of the Wasatch Mining Company and the stockholders therein to the title and ownership of the said property the same should be accepted by the first party, and it should then, after thirty days' notice, pay the said balance of the purchase-money.

It was also provided by said agreement that the first party should take immediate possession of all of the said property, but that until said deed should be delivered it should not extract or remove therefrom any ores or valuable minerals. For a more particular statement of the terms and conditions of said agreement reference is made to a copy thereof, which is hereto attached, marked Exhibit "B," and made a part of this amended complaint.

That in pursuance of the provisions of the said deed and agreement the plaintiff herein afterwards, to wit, on or about the 23rd day of March, A. D. 1883, went into the possession and occupancy of the whole of the said property and premises, and has ever since and does still hold, possess, and occupy the same and every part thereof.

That the powers of the plaintiff company are vested in and exercised by a board of directors, who are authorized to and do direct and control all the business and affairs of said company.

And plaintiff further alleges and shows to the court that prior to and at the time of the execution and deposit of the said deed and agreement in the said bank E. P. Ferry was and ever since
8 has been and is still a member of the board of directors of the plaintiff, The Crescent Mining Company, and during a considerable portion of the time since the making of said deed and contract he was president and general manager thereof.

That during all the said time he has been and is personally familiar with the business affairs of said plaintiff and actively engaged in assisting in carrying on and conducting the same.

That he had full knowledge and information of the execution and deposit in said bank of said deed and agreement at the time the same was done and of the contents thereof, and also that in pursuance thereof the said plaintiff, on or about the 23rd day of March, 1883, took possession of the entire property and premises described in and conveyed by the said deed so deposited, and that in pursuance thereof and the terms of said agreement it had ever since held, occupied, and possessed the same and every part thereof.

That the said William Jennings died at Salt Lake City, Utah, on the 15th day of January, 1886.

And plaintiff further alleges that heretofore, to wit, *on* or about the month of July, A. D. 1886, and while the said suit of the defendant, The Wasatch Mining Company, originally against the said William, Joseph A., and Isaac Jennings, was still pending in said court and undetermined, the plaintiff and defendant herein entered into negotiations whereby the plaintiff sought to have the said defendant agree to join with the parties claiming the title and ownership of

said property adversely to it in perfecting the title of all the
9 said property in the said plaintiff, The Crescent Mining Company.

That the said E. P. Ferry being at the time a member of the board of directors of the said Crescent Mining Company as aforesaid and having full knowledge and information of all the matters hereinbefore stated and the said plaintiff and its other officers and agents relying upon the knowledge of the said Ferry as to the matters aforesaid and trusting and confiding in his integrity and honesty, the said board of directors appointed him a member of a special committee of said board to carry on, conduct, and conclude the said negotiation on behalf of said plaintiff; that in pursuance of said negotiation the said parties, on the 9th day of July, 1886, entered into a contract, bearing date of that day, in which the said defendant, The Wasatch Mining Company, was the party of the first part and the plaintiff herein was the party of the second part, by which the said first party, in consideration of the agreements of the said second party therein contained, did promise and agree to join with the representatives and successors in interest of the said William Jennings in conveying to said second party the Walker and Walker Extension and Buckeye mining claims in fee according to the contract theretofore made between the said second party and the said William Jennings in his lifetime on payment into the district court for the third judicial district of said Territory, subject to its order in the aforesaid action, in which the said Wasatch Mining Company was plaintiff and the said representatives of the said
10 William Jennings and others were defendants, with effectual assurance by said second party that fifteen hundred shares of the first party's capital stock held by said Jennings and transferred by him at the making of said contract to said second party should not participate in the distribution by said first party of said sum of forty-two thousand five hundred ($42,500) dollars, or that in default of such joint conveyance that said first party should convey in fee said property to the second party after the final determination of said suit, if said first party should be decreed to be the owner thereof, on payment to said first party of said sum of forty-two thousand five hundred ($42,500) dollars and said assurance relative to said fifteen hundred shares of said first party's capital stock as aforesaid. In consideration of said agreement on the part of the said first party the said second party in and by said agreement bound itself, on receiving a deed as aforesaid, to pay the said sum of forty-two thousand five hundred (42,500) dollars in the manner thereinbefore indicated and to give assurance as stated as to non-participation in the distribution of said sum of fifteen hundred shares of said first party's capital stock. It was in and by said contract further mutually agreed that if said first party should join with the representatives of said William Jennings in conveying said property, and said second party should desire reasonable further time to make payment into court of said sum of money, said first party would consent to allow such further time, not to exceed one year,
11 then to be agreed on, upon satisfactory security being given

for said payment at the agreed time. A copy of said agreement is hereto attached, marked Exhibit "C," and made a part hereof.

And the plaintiff avers that in entering into the said agreement it was the understanding and intention of each of the parties thereto to include in said contract the whole of the property contained in the description first set forth in this amended complaint and as described in the said deed and agreement between William and Joseph A. Jennings and the said Crescent Mining Company, hereinbefore referred to, of which copies are hereto attached and marked Exhibit "A" and "B," respectively.

That at the time of entering into said contract the parties acting in that behalf made application to the said Deseret National bank to see the said contract Exhibit "B" for the purpose of obtaining and inserting the full and exact description of the said property in said contract, but the said contract Exhibit "B" could not at the time be found, and it was thereupon referred to in said contract Exhibit "C" as the contract of William Jennings and the said Crescent Mining Company; that no other contract was ever entered into or was or is in existence between William Jennings and this plaintiff than the said contract Exhibit "B," and on information and belief the plaintiff alleges that at the time of entering into the aforesaid contract Exhibit "C" the said E. P. Ferry well knew that the same was understood and intended by both parties thereto to include all the said property and premises included in the
12 said deed and contract, Exhibits "A" and "B" and that the reference to said contract of Jennings, Exhibit "B," was for the purpose of effectuating and carrying out that intention and in consequence of the fact that the said parties acting in that behalf did not at the time have in their possession a full and particular description of said property.

And plaintiff alleges that notwithstanding all the facts aforesaid the said E. P. Ferry, while continuing to act in behalf on this plaintiff as such director and member of said special committee, did accept a deed of a portion of said premises so contracted for, a copy of which is hereto attached, marked Exhibit "D," and made a part hereof.

That, as plaintiff is informed and believes and thereupon alleges, said Ferry in accepting said deed fraudulently combined and conspired with certain of the officers and agents of the said defendant, The Wasatch Mining Company, and other persons to the plaintiff unknown, to cheat, wrong, and defraud the plaintiff by accepting the said deed as a compliance with and satisfaction of the said contract Exhibit "C," and in pursuance of said fraudulent purpose the said Ferry did falsely pretend and represent to the plaintiff and its officers that the said deed was in conformity with the provisions of the said contract between plaintiff and defendant, he then and there well knowing that the same did not so conform and that it did not include that portion of the property and premises hereinbefore described as being the area in conflict between the Pinyon and Pinyon

Extension claims and the Walker and Walker Extension
13 and Buckeye claims, and which was covered and included in said contract Exhibit "C" as aforesaid.

That the plaintiff, relying upon and confiding in the integrity and honesty of the said Ferry, was deceived and misled by his said representation that said deed included all the property contracted for by plaintiff, and thereupon acquiesced in the acceptance of said deed until the time hereinafter stated, believing the same to so include all of said property. At the time of making said contract of July 9th, 1886, Exhibit "C," the sum of $2,500 cash was paid by plaintiff to defendant upon the consideration of the purchase of the property so intended to be conveyed, and on the delivery of the deed last aforesaid the payment of the remainder of such purchase-money, to wit, $42,500, was, by a mortgage of even date with said deed, given by plaintiff to defendant upon the entire real property of plaintiff, of value greatly exceeding said last-mentioned sum, fully secured to be paid.

And, as plaintiff is informed and believes, and upon such information and belief alleges, that the said Ferry and said other persons entered into said conspiracy to defraud the plaintiff by omitting the said portion of said property from the said deed, and afterwards procuring the title thereof himself directly or through some of his said confederates and holding the same adversely to the plaintiff; that in the further prosecution of said fraudulent purpose the said E. P. Ferry, as the plaintiff is informed and believes and alleges the fact to be, has been lately engaged in negotiating with the
14 defendant and certain of its officers to purchase the said property so fraudulently omitted from the said deed, and the said defendant threatens to sell and will sell and convey the said property to the said Ferry or some other person, and thereby further cloud the equitable right and title of plaintiff to the said property unless restrained by the order of this court.

Plaintiff further alleges that it did not discover the omission in said deed so accepted on its behalf until the day of the filing of the original complaint herein, and that its attention was then called to the fact by having then for the first time learned that the said Ferry was about to purchase from the said defendant the said portion of the said property so omitted from said deed.

That the said plaintiff has demanded from the said defendant that it correct the said deed so as to include the said premises so omitted and make the same conform to the said contract Exhibit "C," but the said defendant fails and refuses so to do; that all of the said acts of the said defendant and its said officers are in violation of the rights of the plaintiff and contrary to equity and good conscience, and the said acts of the said E. P. Ferry are in violation of his trusts and duties and obligations to the plaintiff as one of its board of directors and its special agent to transact the business aforesaid.

Wherefore the plaintiff, as in its original complaint, prays that all of the said property and premises be adjudged and decreed to be the property of the plaintiff, free and clear of and from all
15 claims and conveyance of any other person or persons what-

soever; that the defendant be required to correct and reform the said deed, Exhibit "D," by executing and delivering to plaintiff a good and sufficient deed, conveying all and singular the premises and property in this amended complaint first described; that the said defendant, its officers, agents, attorneys, and each and every of them and all other persons whatsoever acting by, through, or under it be enjoined and restrained from selling, conveying, or encumbering the said properity or any part thereof or doing any other act whatsoever that will in anywise affect, interfere with, or cloud the title of the said property or any part thereof; that the plaintiff have such other and further relief in the premises as may be equitable, and that it have and recover its costs herein.

P. L. WILLIAMS AND
E. T. SPRAGUE,
Plaintiff's Attorneys.

(Duly verified.)

16 EXHIBIT A.

This indenture made and entered into the eighth day of March in the year of our Lord one thousand eight hundred and eighty-three, between William Jennings and Joseph A. Jennings, both of the city and county of Salt Lake, in the Territory of Utah, the parties of the first part, and the Crescent Mining Company, a corporation created and existing under and by virtue of the laws of said Territory, the party of the second part, witnesseth:—

That the said parties of the first part for and in consideration of the sum of fifty thousand ($50,000.—) dollars, lawful money of the United States, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have remised, released, and forever quitclaimed, and by the presents do remise, release and forever quitclaim unto the said party of the second part, and to its successors and assigns, the following-described mining ground, property and premises, situated in Uintah mining district, Summit county, Utah Territory, bounded with magnetic variation as 17 deg. 20 min. east as follows, to wit:—

Beginning at corner No. 1 of the Walker and Walker Extension mine and running thence N. 44 deg. 35 min. W. two hundred and twenty (220) feet to corner No. 2 of said mine, from which U. S. mineral monument No. 4 bears S. 46 deg. 10 min. W. at the distance of one hundred and fifty-eight (158) feet; thence S. 21 deg. 15 min. W. one hundred and ninety-six (196) feet to corner No. 3; thence S. 68 deg. 5 min. W. twenty-eight hundred and four (2804)
17 feet to corner No. 4; thence S. 44 deg. 35 min. E. two hundred and sixteen (216) feet to corner No. 5; thence N. 68 deg. 5 min. E. fourteen hundred and ten (1410) feet to corner No. 3 of the Buckeye mine; thence S. 44 deg. 35 min. E. along the southerly end line of said Buckeye mine one hundred and thirty (130) feet to corner No. 4 thereof; thence N. 68 deg. 5 min. E. fourteen hundred (1400) feet to corner No. 1 of said last-mentioned mine; thence N. 44 deg. 35 min. W. one hundred and thirty (130)

feet to corner No. 2 of said Buckeye mine, the same being also corner No. 6 of the said Walker and Walker Extension line; thence N. 21 deg. 15 min. E. one hundred and ninety (190) feet to the place of beginning. The said described premises being mineral entries Nos. 87 and 88, lots 40 and 41, and patented as the Walker and Walker Extension and Buckeye mining claim. Together with all dips, spurs and angles, and also all metals, ores, gold and silver bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident appendant or appurtenant, or therewith usually had and enjoyed and also all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and all the rents, issues and profits thereof, and also all the estate, right title interest, property, possession, claim and demand whatsoever, as well in law as in equity of the said parties of the first part, of, in or to *to* the said premises and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the said premises, to-
18 gether with the appurtenances and privileges thereto incident unto the said party of the second part, its successors and assigns forever.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

(Signed) WILLIAM JENNINGS. [SEAL.]
" JOSEPH A. JENNINGS. [SEAL.]

Signed, sealed, and delivered in the presence of—

JOSEPH E. SIMMONS.
CHARLES W. STAYNER.

UNITED STATES OF AMERICA.

TERRITORY OF UTAH, } *ss:*
County of Salt Lake, }

On this thirteenth day of March, A. D. one thousand eight hundred and eighty-three, personally appeared before me, Joseph F. Simmons, a notary public duly appointed, qualified, and commissioned in and for said county, Joseph A. Jennings, whose name is subscribed to the annexed instrument as a party thereto, personally known to me to be the same person described in and who executed the said annexed instrument as a party thereto, and duly acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and af-
19 fixed my notarial seal, at my office in Salt Lake City, U. T., the day and year in this certificate first above written.

[SEAL.] JOSEPH F. SIMMONS,
Notary Public, Salt Lake County, U. T.

UNITED STATES OF AMERICA.

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

On this twenty-third day of March, A. D. one thousand eight hundred and eighty-three, personally appeared before me, Charles W. Stayner, a notary public, duly appointed, qualified, and commissioned in and for said county, William Jennings, whose name is subscribed to the annexed instrument as a part- thereto, personally known to me to be the same person described in and who executed the said annexed instrument as a party thereto, and duly acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my notarial seal, at my office in Salt Lake City, U. T., the day and year in this certificate first above written.

[SEAL.]

CHAS. W. STAYNER,
Notary Public, Salt Lake County, U.

(Here follows diagram marked p. 20.)

20½ EXHIBIT B.

This agreement made and entered into this eighth day of March, A. D. 1883, between the Crescent Mining Company, a corporation under the laws of Utah Territory (hereinafter designated as the first party) the party of the first part, and William Jennings and Joseph A. Jennings, both of the city and county of Salt Lake, in said Territory, (hereinafter designated as the second parties) the parties of the second part, witnesseth:

That, whereas, the said second parties have sold, and by deed bearing even date herewith conveyed to the said first party, the Walker and Walker Extension and Buckeye min-g claims, situated in Uintah mining district, Summit county, in said Territory, more particularly described in said deed, and for which purpose reference thereto is hereby named; and whereas an action is now pending in the district court of the third judicial district of said Territory, wherein the Wasatch Mining Company as plaintiff and the said second parties and Isaac Jennings are defendants, which action involves the title and ownership of the said mining claims,

Now, it is hereby mutually covenanted and agreed by and between the parties hereto that the said deed together with this agreement shall be deposited with the Deseret National Bank of Salt Lake City, and there held subject to the following conditions,

21 to wit: Whenever and as soon as the said action and the subject-matter of litigation therein involved shall have been finally determined, if such determination and decision be favorable to the said defendants, that is to say if by such decision it shall be held and determined that the title and ownership of the said property is in the said defendants, the said first party is to pay the second parties the sum of forty-two thousand five hundred ($42500.)

Plat

OF THE CLAIM OF

WASATCH MINING CO.

UPON THE

·BUCKEY·MINE·

Uintah Mining District, Summit Co.,

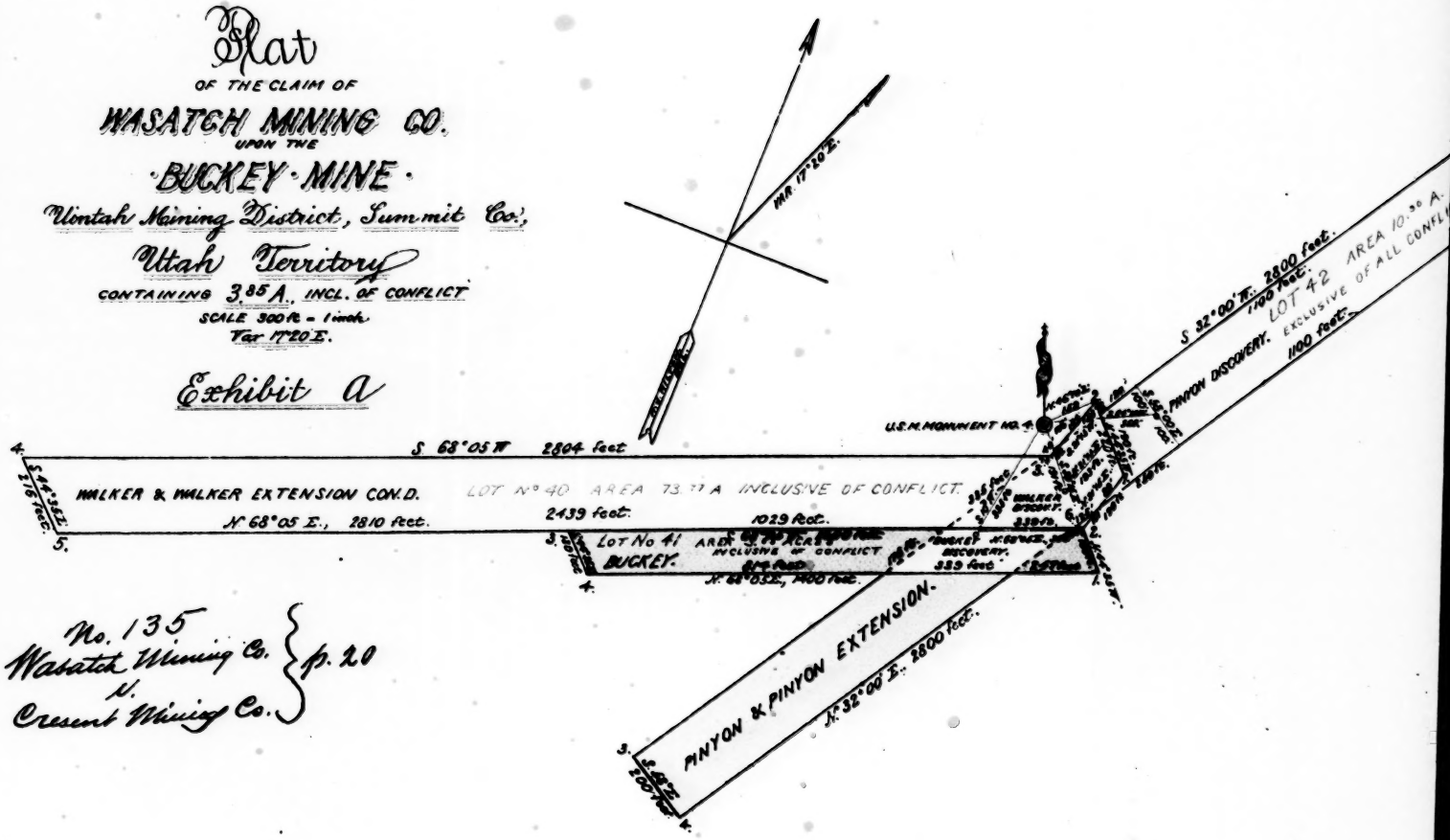
Utah Territory

CONTAINING 3.85 A., INCL. OF CONFLICT

SCALE 300 ft. = 1 inch.

Var 17°20 E.

Exhibit a



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Cresent Mining Co.

dollars, being the balance of the purchase of the said property, the sum of seven thousand five hundred ($7,500.) dollars thereof having been paid at the time of the signing this agreement; and upon the payment of the said sum of money the said deed is to be delivered to and accepted by the said first party.

If at any time before the determination of the said action and after three months from date, the said second parties shall execute and deliver to the first party their written agreement, covenanting and guaranteeing to save harmless the said first party from all claims of the said Wasatch Mining Company and the stockholders therein, to the title and ownership of the said property, the same shall be then accepted by the said first party, and it shall thereupon, on thirty days notice, pay the said second parties the aforesaid sum of money, the balance of said purchase price of said property.

Upon the execution of this agreement the first party is to go into the possession and occupation of the said property, but until the delivery to it of the said deed it is not to take out of, or
22 remove, nor suffer to be taken out or removed, from within the boundaries of the premises described in said deed, any metal, ores or other mineral or substance of value, and for the purpose of satisfying them that this condition and stipulation is being kept and performed, the said second parties shall have the right and privileges of visiting and inspecting the underground workings and openings in said property from time to time, and as often as once in each week. The said first party may at any time at its option pay the balance of said purchase-money into the said bank and thereupon the said deed shall be delivered to it.

If at any time the first party shall obtain a conveyance of the said property from the said Wasatch Mining Company and a waiver of their claim thereto by the stockholders therein, it shall thereupon be entitled to a delivery of the said deed upon paying the said balance of the purchase-money.

In witness whereof, the said parties here have hereunto set their hands and seals the day and year first above written.

[The Crescent Mining Company Seal.]

CRESCENT MINING COMPANY,
By R. N. BASKIN, *Vice-President.*
C. L. HAINES, *Secretary,* and
ARTHUR BROWN,
M. KIRKPATRICK,
R. N. BASKIN,
Special Committee Duly Authorized for That Purpose.
WILLIAM JENNINGS. [SEAL.]
JOSEPH A. JENNINGS. [SEAL.]

23 EXHIBIT C.

It is mutually agreed by and between the Wasatch Mining Company, a corporation organized under the laws of Utah Territory, of the first part, and the Crescent Mining Company, a corporation also

organized under the laws of Utah Territory, of the second part, as follows—that is to say:

Said party of the first part, in consideration of the agreement on the part of the second part hereafter set forth, hereby agrees with said second party, its successors and assigns, to join with the representatives and successors in interest of William Jennings, conveying to the said second party these two patented mining claims, situated in Uintah mining district, Summit county, in the Territory of Utah, call- the "Walker and Walker Extension" and "Buckeye" mining claims in fee, according to the contract heretofore made between said second party and William Jennings in his lifetime on payment into the district court for the third judicial district of said Territory, subject to the order of the court, in an action in which said first party is plaintiff and said representatives of William Jennings and others are defendants, with effectual assurance by said second party that fifteen hundred shares of first party's capital stock, held by said Jennings and transferred by him at the making of said contract to said second party, shall not participate in the distribution by said first party of said sum of forty-two thousand five
24 hundred dollars, or that in default of such joint conveyance that said first party will convey in fee said property to said second party after the final determination of said suit, if said first party shall be decreed to be the owner thereof, on payment to said first party of said sum of forty-two thousand five hundred dollars and said assurance relative to said fifteen hundred shares of said first party's capital as aforesaid.

Said second party, in consideration of the foregoing agreement on the part of said first party, hereby agrees and binds himself on receiving deed as aforesaid to pay as aforesaid the sum of forty-two thousand five hundred dollars in the manner hereinbefore indicated, and to give assurance, as above stated, as to non-participation in the distribution of said sum of fifteen hundred shares of said first party's capital stock.

It is mutually agreed that if said first party shall join with the representatives of William Jennings in conveying said property and said second party shall desire a reasonable further time to make payment into court of said sum of money, said first party will consent to allow such further time not exceeding one year, then to be agreed on, on satisfactory security being given for said payment at the agreed time.

In witness whereof the parties have respectively executed this agreement this ninth day of July, A. D. 1886.

WASATCH MINING COMPANY,
Per N. W. CLAYTON, *Secretary.*

Pursuant to order of the board of directors July 9th, 1886.

CRESCENT MINING COMPANY,
By W. S. McCORNICK,
By EDW'D P. FERRY,
Special Committee.

25 EXHIBIT D.

This indenture, made the first day of September, in the year of our Lord one thousand eight hundred and eighty-six, between the Wasatch Mining Company, a corporation organized under the laws of Utah Territory, the party of the first part, and the Crescent Mining Company, a corporation organized under the laws of Utah Territory, the party of the second part, witnesseth:—

That the said party of the first part for and in consideration of the sum of forty-two thousand five hundred dollars to it in hand paid, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, remised, released, conveyed and quitclaimed, and by these presents doth grant, bargain, sell, remise, release, convey and quitclaim unto the said party of the second part, and to its successors and assigns forever, all the right title and interest, estate, claim and demand, both in law and equity, as well in possession as in expectancy of the said party of the first part, of, in or to that certain portion, claim and mining right, title or property on those certain veins or lodes of rock containing precious metals of gold, silver and other metals, and situate in the county of Summit and Territory of Utah, and described as follows, to wit:—Those patented mining claims situate in Uintah mining district in said county and Territory, named respectively the "Walker and Walker Extension mine" as described in patent from the United States to said
26 party of the first part, dated Nov. 6th, 1874, and recorded in the office of the recorder of said county, in Book E, on pages 19 to 26; and also the "Buckeye mine," as described in patent from the United States to said party of the first part, dated Nov. 6th, 1874, and recorded in the office of the recorder of said county in Book E, on pages 27 to 34.

Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed and also all and singular the tenements, hereditaments or appurtenances thereto belonging, and the rents, issues and profits thereof, and also all the estate, right, title, interest, possession, claim and demand whatsoever of the said party of the first part, of, in or to the premises, and every part and parcel thereof.

To have and to hold, all and singular the premises with the appurtenances and privileges thereto incident unto the said party of the second part.

And the party of the first part doth hereby agree to and with the party of the second part that it hath full right and power to sell and convey the said premises, and that said premises are now free and clear from all incumbrances, sales or mortgages made or suffered by the said party of the first part.

In witness whereof, said party of the first part hath hereunto set its name and corporate seal the day and year first above written.

WASATCH MINING COMPANY, [SEAL.]

27 By H. B. CLAWSON, JR., *President.*

Sealed and delivered in the presence of:—
J. L. PERKINS,
M. E. CUMMINGS.

Attest:

NEPHI W. CLAYTON,
Secretary Wasatch Mining Company.

[Wasatch Mining Company, Corporate Seal.]

TERRITORY OF UTAH, }
County of Salt Lake, } ss:

On this eleventh day of October, A. D. one thousand eight hundred and eighty-six, before me, Melvin E. Cummings, a notary public in and for said Salt Lake county, duly commissioned and qualified, personally appeared the within-named H. B. Clawson, Jr., president of the Wasatch Mining Company, whose name is subscribed to the foregoing deed of conveyance as officer and agent of the grantor therein, personally known to me to be the identical person mentioned in and who executed the same, and who duly acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned as the act and deed of the Wasatch Mining Company.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL.] MELVIN E. CUMMINGS,
Notary Public.

Endorsed: No. 6785. Title. Amended complaint. Received copy of within January 31st, 1887. Sutherland & McBride, defendant's attorneys. Filed January 31st, 1887. J. M. Zane, clerk.

28 In the District Court for the Third Judicial District of Territory of Utah.

(Title.)

Said defendant, answering the amended complaint filed herein, denies that the exterior boundaries of the Walker and Walker Extension and Buckeye mines are as set out in said amended complaint, according to the official survey and patent thereof.

Said defendant denies that the parcel secondly described in said amended complaint and alleged to be erroneously included in the patent of the Pinyon and Pinyon Extension mine was any part of the said "Walker and Walker Extension" or Buckeye mine mining claims, according to the official survey and patent thereof, or was by mistake or erroneously included in said "Pinyon and Pinyon Extension" patent.

Said defendant denies that the parcel last aforesaid, which is the parcel now in controversy, was at all times or at any time since the making of said official survey and issuing of said patents been known, understood, or recognized by all or any of the owners or parties interested in each of said claims or by any of them to belong to or to constitute a part of said Walker and Walker Extension and Buckeye mines respectively, but all such owners and persons interested knew, understood, and recognized the said last-mentioned parcel as part of said Pinyon and Pinyon Extension mining claim as patented, of which, in fact, it was a part and belonging to
29 said defendant under and by virtue of a deed of conveyance to it in fee from the patentees of said Pinyon and Pinyon Extension claim and not otherwise, and the defendant denies that the said conveyance was made to correct any errors in the application for the patent of the said Pinyon and Pinyon Extension mining claim, but was made upon a valuable consideration. Said defendant, on information and belief, denies that Wm. Jennings and Joseph A. Jennings, or either of them, in the year 1879, or at any time, went into possession of the premises so conveyed to defendant by said deed, being the premises now in controversy. They had a mortgage of the said Walker and Walker Extension and Buckeye mining claims as patented, and took and held tortious possession thereof during the period mentioned in that behalf in said amended complaint, but had no color of title whatever to or interest in or lien or charge on said premises in controversy; and this defendant avers that said mortgage was in the form of a deed from the United States marshal for Utah Territory, founded on three sales of said Walker and Walker Extension and Buckeye mines under executions against this defendant; that annexed hereto as part of this answer and marked Exhibit "A" is a copy of one of the certificates of sale under one of said executions, and the other certificates contain the same description.

One of them shows a sale to John Danielson and the other a sale to Swen Olsen.

The said defendant denies that the suit by this defendant against said William Jennings, Joseph A. Jennings, and Isaac Jennings involved the title and ownership of the parcel now in con-
30 troversy, but only an alleges trespass by them thereon; that only the title and ownership of said Walker and Walker Extension and Buckeye mining claims as patented was involved in said action; that a decree thereon has been rendered in favor of said defendant herein for conveyance of said claims to said defendant and for thirty-three thousand dollars and more for ores extracted therefrom by them. This defendant has no information or belief sufficient to answer whether, while said action was pending or at any time, said William Jennings and Joseph A. Jennings, upon a valuable consideration or otherwise, executed and deposited with the Deseret National Bank of Salt Lake City a deed, by the terms of which they conveyed to the plaintiff herein the whole of said Walker and Walker Extension and Buckeye mining claims, including therein the parcel now in controversy, as set forth in said amended com-

plaint and Exhibit "A" attached thereto, nor whether, as a part of said transaction and sale, the said plaintiff or the party of the first part and said William Jennings and Joseph A. Jennings, as parties of the second part, for a valuable consideration, entered into an agreement, of the tenor in that behalf set sorth in said complaint and in Exhibit "B" thereto attached, and therefore this defendant denies said allegations respectively.

This defendant denies on information and belief that said plaintiff, in pursuance of said alleged agreement went into possession of the premises now in controversy or any part thereof, and if said
31 plaintiff has any possession thereof it acquired no right to take such possession from said contract, because said Jennings had no color of title thereto and the same was taken without the knowledge or consent of the defendant and is a tortious possession; and this defendant on information and belief denies that said Ferry knew at any time that said plaintiff had or claims to have possession of said parcel now in controversy.

Said defendant denies that on or about the 9th day of July, 1886, or at any time, the plaintiff and defendant entered into any negotiations whereby the plaintiff sought to have the defendant agree to join with the parties claiming the title and ownership of any property, including the premises in controversy, adversely to defendant in perfecting the title to all said property, including the premises in controversy, in the plaintiff; but such negotiations were had relative to said Walker and Walker Extension and Buckeye mining claim as patented, but relating to no other property, in whole or in part; that such negotiations resulted in a contract, which was made and executed in the terms contained in Exhibit "C" attached to said amended complaint, but deceptively recited in the body of said amended complaint.

Said defendant denies that in entering into said agreement it was the understanding or intention of each or either of the parties thereto to include in said contract the premises now in controversy or any part thereof or to include any other property than that granted to the defendant by the patents of the Walker and Walker Extension and Buckeye mining claims; and this defendant alleges that it was well known to plaintiff and to E. P. Ferry, one of its agents named in said amended complaint in said negotiation,
32 and at the time of making said agreement annexed to said amended complaint in Exhibit "C," that said William and Joseph A. Jennings had no color of title to or interest in or claim on the premises now in controversy, and that the said negotiations and agreement had no reference whatever thereto. Said defendant denies on information and belief that at the time of entering into said contract or agreement any person acting in behalf of this defendant made any application to said Deseret National bank to see the contract referred to in said complaint or Exhibit "B" attached thereto for any purpose, and this defendant denies that said contract referred to in said amended complaint as Exhibit "B" attached thereto was the only contract between William Jennings and said plaintiff, and this defendant denies on information and belief that at

the time of entering into said contract attached to said amended complaint as Exhibit "C" said E. P. Ferry knew that it was understood or intended by both parties thereto to include therein the premises now in controversy, and defendant avers that said E. P. Ferry knew that it was not the intention of said parties to include said premises, and defendant denies that the reference in said contract was a reference or intended to be a reference to said Exhibit "B" attached to said amended complaint, and defendant denies that said reference was inserted because the parties acting in that behalf did not have in their possession a full and particular description of the property, and avers that they had a full and particular description in the patents of all said claims; said defendant denies that said
33 E. P. Ferry accepted defendant's deed, or, as defendant is informed and believes, ever saw it, and this defendant denies that said defendant executed any deed upon said contract, marked Exhibit "C," attached to said amended complaint; said defendant alleges that a deed was made to said plaintiff by said defendant pursuant to a modified bargain in the negotiation of which said E. P. Ferry took no part, and a final agreement between the parties was reduced to writing only in said deed from said defendant to said plaintiff, and in the plaintiff's mortgage for the consideration a copy of said deed is attached to said amended complaint and marked Exhibit "D," and a copy of said mortgage is hereto attached as a part of this answer and marked Exhibit "B." The said deed was delivered to the secretary of the said plaintiff, C. H. Withey, and the mortgage delivered by him. This defendant avers that E. P. Ferry, who is charged in said complaint with fraud in connection with the preparation and exchange of the deed and mortgage, was in no way to the knowledge of this defendant connected with said transaction, and he was not present when that part of the business was done.

On information and belief this defendant denies that said plaintiff was deceived or misled by said Ferry's representations relative to said deed or otherwise. This defendant denies that said plaintiff was misled or deceived at all, and this defendant avers that said deed included all the property intended to be included therein. It included all the property which was the subject of negotia-
34 tion; all that either party understood or supposed was to be included therein. This defendant denies all conspiracy with said Ferry to withhold or that there had been withheld from plaintiff any part of the premises negotiated for or agreed by defendant to be sold, or for any purpose; and defendant denies on information and belief that said Ferry misled or deceived the plaintiff or made any false representations to plaintiff or in any manner influenced the plaintiff in the acceptance of said deed or in any acquiescence therein. This defendant denies that at the time of entering into said contract of July 9th, 1886, or at any time the sum of $2,500 or any other sum was paid by plaintiff to defendant upon the consideration of the purchase of the property intended to be conveyed.

As this defendant has never negotiated with plaintiff to sell to

plaintiff the premises in controversy, the plaintiff has never offered to defendant to buy it or offered any sum therefor, and therefore the plaintiff has no right to the restraining order of this court to prevent this defendant from selling the said premises to any purchaser, and this defendant denies that the plaintiff has ever demanded of it, except by bringing this suit, to correct said deed or to make the same conform to said contract referred to in said complaint as Exhibit "C."

This defendant alleges that no contract in writing was ever made between said defendant and plaintiff for sale of said prem-
35 ises in controversy, and the said defendant will insist on the benefit of the statute of frauds, namely, sec. 1 of the act entitled "An act to punish frauds," approved February 18th, 1876, of Utah Territory, being section 1010 of the Compiled Laws of said Territory.

Wherefore the defendant prays to be hence dismissed with its costs.

SUTHERLAND & McBRIDE,
W. H. DICKSON,
Defendant's Attorneys.

EXHIBIT "B."

This indenture made this first day of September, in the year one thousand eight hundred and eighty-six, between the Crescent Mining Company, a corporation organized under the laws of Utah Territory, party of the first part, and the Wasatch Mining Company, a corporation organized under the laws of said Territory, party of the second part, witnesseth:

Whereas, first party heretofore made a contract with William Jennings, Joseph A. Jennings and Isaac Jennings, for the purchase from them, as owners of those certain patented mining claims situate in Summit county, Territory of Utah, called and patented by the name of the Walker and Walker Extension and Buckeye mining claims, for the sum of fifty thousand dollars, and paid on the purchase-money, to said vendors, the sum of seven thousand five hundred dollars, receiving then, as part of said purchase fif-
36 teen hundred shares of the capital stock of said Wasatch Mining Company;

And whereas, said second party, claiming to be the owner of said properties, heretofore brought suit against said William Jennings Joseph A. Jennings and Isaac Jennings, in the district court for the third judicial district of Utah Territory, for the recovery thereof, which suit is still pending against said Isaac Jennings, Joseph A. Jennings and the representatives of said William Jennings, now deceased;

And whereas, said second party has conveyed all its right, title and interest in and to said properties to said first party, pursuant to agreement heretofore made with said second party, for the sum of forty-two thousand five hundred dollars, the said first party agreeing that the fifteen hundred shares of the capital stock of the said

Wasatch Mining Company, should not participate in the distribution of said forty-two thousand five hundred dollars nor derive any benefit therefrom.

Now, therefore, the said party of the first part, in consideration of the premises, and the sum of forty-two thousand five hundred dollars, in said conveyance, the receipt whereof is hereby acknowledged, hath granted, sold and conveyed, and by these presents doth sell, grant and convey unto said party of the second —, its successors and assigns forever, its group of mining claims, situate in Uintah mining district Summit county Utah Territory, bearing the following names, to wit: The Pinyon and Pinyon Extension mining claims except 2.55 acres heretofore conveyed away, the Rebellion, the Hecla, the Ætna, the Tidal Wave, the Mulkahy, the Shamus
37 O'Brien, the Climax, the James A. Garfield, the Samuel, the Bible Back, the Senate, and the Fallon mining claims, and also the said Walker and Walker Extension and the Buckeye mines and mining claims; also the Crescent tramway from said mines to Park City, with all the equipments thereof, belonging to the said first party; also the concentrating mill and land and improvements connected therewith at said Park City and including the vein, veins or lodes, and all the mineral-bearing rock and ores in said mining claims or thereto pertaining; and also the tenements, hereditaments and appurtenances thereto belonging.

To have and to hold the said several properties with the veins, lodes, mineral ores, and appurtenances aforesaid, unto the said party of the second part, and to its successors and assigns forever.

This conveyance is intended as a mortgage to secure the payment of forty-two thousand five hundred dollars, in one year from the date hereof, which sum said first party agrees to pay at the time aforesaid; and said payments shall be made as follows, to wit: Absolutely to said party of the second part its successors or assigns, if, at said time said suit shall have been finally determined in favor of said second party, and its title to said Walker and Walker Extension and Buckeye mining claims, maintained and established, and the same is free of all encumberances made or suffered by the said party of the second part; or if said action is still pending at the end of a year from date, and all the parties thereto direct how such payment shall be made, it shall be made accordingly; but if the action is then pending and undetermined, and no direction given by all the
38 parties thereto, then and in that case payment shall be made of said principle into said court in said action, recognized by order thereof, to be disposed of as follows: To be paid to said second party its successors and assigns, on the final determination of said action in favor of said plaintiff and confirmation of its title to said last-mentioned property, the same being free of all incumbrances made or suffered by said second party, or assignment of the decree, except for costs, to said first party, and subject to be repaid to said first party, on its request or on its order, if said action be finally and on its merits determined adversely to said second party, on its claim or title to said last-mentioned property and on payment being made as aforesaid of said sum of forty-two thous-nd five hundred

dollars as aforesaid, then these presents shall be void and in case default shall be made and the payment of said principle or any part thereof, then the said party of the second part, its successors or assigns, are hereby authorized and empowered to sell said premises, or any part thereof, in the manner prescribed by law, and out of the moneys arising from such sale to retain and pay the said principal, together with the costs and charges of making such sale, and a reasonable attorney's fee for foreclosure or collection, and the overplus if any there be, shall be paid by the party making such sale, on demand, to said party of the first part its successors or assigns.

In witness whereof, said party of the first part has hereunto set and affixed its corporate name and seal, the day and year first above written.

CRESCENT MINING COMPANY,
39 By LEWIS H. WITHEY, *President.*

Attest: CHESTER H. WITHEY, *Secretary.*

Signed, sealed, and delivered in the presence of—
W. S. McCORNICK.

STATE OF MICHIGAN, } ss:
County of Kent, }

On this 4th day of October, A. D. one thousand eight hundred and eighty-six, personally appeared before me, as notary public in and for said county, Lewis H. Withey, president of the Crescent Mining Company of Utah, personally known to me to be the person herein described, and who executed the foregoing mortgage as said officer of the said Crescent Mining Company, described in said mortgage, who acknowledge to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned as the act and deed of said Crescent Mining Company.

ANTON G. HODENPYL,
Notary Public, Kent County, Mich.

STATE OF MICHIGAN, } ss:
County of Kent, }

I, Cornelius L. Harvey, clerk of said county (and *ex officio* clerk of the circuit court thereof, being a court of record and common-law jurisdiction), do hereby certify that Anton Hodenpyl, before
40 whom the above and foregoing instrument appears to have been acknowledged, is and was at the date of taking such acknowledging and certifying thereof a notary public within and for said county, duly commissioned, qualified, and sworn and authorized by the laws of said State to take such acknowledgments and to certify the same; and I further certify that I am acquainted with the said handwriting of said Anton G. Hodenpyl and believe his signature appended to the above certificate of acknowledgment to be genuine, and that the said instrument is executed and acknowledged according to the laws of the State of Michigan.

In witness whereof I have hereunto set my hand and official seal,

at the city of Grand Rapids, this fourth day of October, A. D. 1886.

CORNELIUS L. HARVEY, *Clerk*,
By FRANK P. CARPENTER, *Deputy*.

I, William Nelson, United States marshall for the Territory of Utah, do hereby certify that, by virtue of an execution issued out of and under the seal of the district court of the third judicial district of said Territory on a judgment rendered in a justice court in and for the first precinct of the county of Salt Lake on the second day of January, A. D. 1877, in favor of Gust. Norquist against The Wasatch Mining Company, a transcript of said judgment having been filed in the office of the clerk of said district court, said execution having been tested the 20th day of February, A. D. 1877, by which I was commanded to make the amount of $237.64 and
41 $4 costs of suit, to satisfy said judgment, with costs and interest thereon, out of the personal property of said Wasatch Mining Company, defendant in said action, and, if sufficient personal property could not be found, then out of the real property belonging to said defendant—

I have levied on and this day at the hour of 12 noon, at the front door of the court-house, in the city or town of Coalville, in the county of Summit, in said Territory, sold at public auction, according to the statute in such case made and provided, to said Gust. Norquist, who was the highest bidder thereon, for the sum of 273.26, which was the highest sum bid and whole price paid for the same—

All the right, title, interest, claim, and estate which the Wasatch Mining Company held on the 2nd day of January, A. D. 1877, or may have since acquired of, in, or to the following-described mining property, to wit: The Walker and Webster Extension and Buckeye mines, lode or lodes, situated in Uintah mining district, county of Summit and Territory of Utah, for particular description of which see U. S. patents of the Webster and Walker Extension and Buckeye mines, recorded on pages 24, 25, 26, 33, and 34 of Book "E" of Record of Deeds in the recorder's office of Summit county, Utah Territory, together with all and singular the tenements and hereditaments and appurtenances thereunto belonging or in anywise appertaining.

And I further certify that said property was sold in one parcel and is subject to redemption pursuant to the statute in such cases made and provided.

Given under my hand this 17th day of March, A. D. 1877.

WILLIAM NELSON,
U. S. Marshal,
42 By J. FRED. CORKER, *Deputy*.

TERRITORY OF UTAH,
County of Salt Lake, } ss:

N. W. Clayton, being duly sworn, says: I am an officer, namely, secretary, of the defendant corporation.

I have read the foregoing answer and know the contents thereof, and that the same is true of my own knowledge except as to those matters therein stated on information and belief, and as to those matters I believe to be true.

NEPHI W. CLAYTON,
Secretary Wasatch Mining Co.

Subscribed and sworn to before me this 23rd day of February, 1887.

MARLOW L. CUMMINGS,
Notary Public, Salt Lake Co., Utah T'y.

Endorsed: Title. Defendant's answer. Service of their answer February 23rd, 1887, admitted. E. T. Sprague, plaintiff's attorney. Sutherland & McBride and W. H. Dickson, attorneys for defendant. Filed February 23rd, 1887. J. M. Zane, clerk, by H. G. McMillan, deputy clerk.

43 (Title.)

This action having been heretofore tried by the court sitting without a jury, the evidence and arguments of counsel having been heard and considered, the court makes, certifies, and files therein the following:

Findings of Fact.

In July, 1886, said plaintiff contracted to buy of defendant and defendant agreed to sell to plaintiff for a valuable consideration the following-described mining property and premises, situated in Uintah mining district, Summit county, Utah Territory, bounded, with magnetic variation at 17 deg. and 20 min. east, as follows, to wit:

Beginning at corner No. 1 of the Walker and Walker Extension mine, and running thence N. 44 deg. 35 min. west 220 feet to corner No. 2 of said mine, from which U. S. mineral monument No. 4 bears south 46 deg. 10 min. west, at a distance of 158 feet; thence south 21 deg. 15 min. west 196 feet to corner No. 3; thence south 68 deg. 5 min. west 2,804 feet to corner No. 4; thence south 44 deg. 35 min. east 216 feet to corner No. 5; thence north 68 deg. 5 min. east 1,410 feet to corner No. 3 of the Buckeye mine; thence south 44 deg. 35 min. east along the southerly end line of said Buckeye mine 130 feet to corner No. 4 thereof; thence north 68 deg. 5 min. east 1,400 feet to corner No. 1 of said last-mentioned mine; thence north 44 deg. 35 min. west 130 feet to corner No. 2 of said Buckeye mine, the same being also corner No. 6 of said Walker and Walker Extension mine; thence north 21 deg. 15 min. east 190 feet to the

44 place of beginning, together with all dips, spurs, and angles, and also all metals, ores, gold and silver bearing quartz, rock, and earth therein, and all the rights, privileges, and franchises thereto incident, appendant, or appurtenant or therewith usually had and enjoyed, and all the estate, rights, title, interest, and property, possession, claim, and demand of said party defendant in or to the same.

2. In pursuance of said contract a deed was made by defendant to plaintiff, bearing date September 1st, 1886; wherein and whereby, by mistake and inadvertance in describing the property so contracted for and to be deeded, there was omitted therefrom so much of said property and premises as had been patented by the United States to James Lowe and others as part of lot 42, called the Pinyon and Pinyon Extension mining claim.

3. That in making said contract and said deed it was the intention of parties plaintiff and defendant to include the premises and property omitted as last aforesaid, and the purchase price thereof was paid and secured with that of the property deeded.

Conclusions of Law.

Plaintiff is entitled to have its deed from defendant so reformed as to embrace and include in its description of the property to be conveyed all that which is described in the first above finding of fact.

Let judgment and decree be entered accordingly.

Dated July 30th, 1887.

(Signed) C. S. ZANE, *Judge.*

45 (Title.)

This cause having been tried by the court sitting without a jury, and findings of fact and conclusions of law having been duly made and filed—

Whereby it appears in substance that said plaintiff is entitled to the relief demanded in the complaint, now, on motion of P. L. Williams and E. T. Sprague, attorneys for plaintiff, and by virtue of the law and the premises, it is hereby ordered, adjudged, and decreed that defendant forthwith on demand therefor execute and deliver to said plaintiff a deed granting and conveying to plaintiff the following-described mining property and premises, situated in Uintah mining district, Summit county, Utah Territory, bounded, with magnetic variation at 17 deg. 20 min. east, as follows, to wit: Beginning at corner No. 1 of the Walker and Walker Extension mine, and running thence at 44 deg. 35 min. west 220 feet to corner No. 2 of said mine, from which U. S. mineral monument No. 4 bears south 46 deg. 10 min. west, at a distance of 158 feet; thence south 21 deg. 15 min. west 196 feet to corner No. 3; thence south 68 deg. 5 min. west 2,804 feet to corner No. 4; thence south 44 deg. 35 min. east 216 feet to corner No. 5; thence north 68 deg. 5 min. east 1,410 feet to corner No. 3 of the Buckeye mine; thence south 44 deg. 35 min. east along the southerly end line of said Buckeye mine 130 feet to corner No. 4 thereof; thence north 68 deg. 5 min. east 1,400 feet to corner No. 1 of said last-mentioned mine; thence north

46 44 deg. 35 min. west 130 feet to corner No. 2 of said Buckeye mine, the same being also corner No. 6 of said Walker and Walker Extension mine; thence north 21 deg. 15 min. east 190 feet to the place of beginning, together with all dips, spurs, and angles, and also metals, ores, gold and silver bearing quartz, rock, and

earth therein, and all the rights, privileges, and franchises thereto incident, appendant, or appurtenant or therewith usually had and enjoyed, and all the estate, right, title, interest, and property, possession, claim, and demand of said party defendant in or to the same.

That until and in default of such conveyance all the rights, title, and interest of said defendant in and to the property last aforesaid held on the 3rd day of January, 1887, or since acquired by defendant be, and hereby is, vested in and adjudged to be owned and possessed by said plaintiff, and the title thereto is hereby confirmed and qui-ted in said plaintiff; further, that plaintiff have and recover of and from defendant the sum of $—, cost.

Dated July 30th, 1887.

(Signed) C. S. ZANE, *Judge.*

Attest: J. M. ZANE, *Clerk,*
By H. G. McMILLAN, *Dep. Clerk.*

Endorsed: Title. Findings and decree. "Copy."

47 In the District Court for the Third Judicial District of the Territory of Utah.

(Title.)

Notice of Appeal.

To the above-named plaintiff and to Messrs. Baskin, Sprague, and Williams, its attorneys:

Please take notice that the defendant above named hereby appeals to the supreme court of Utah Territory from the judgment herein entered on the 30th day of July, 1887, in said court in favor of plaintiff and against the said defendant and from the whole thereof, and also from the order of said court made on the 7th day of February, 1888, overruling said defendant's motion for a new trial herein.

Dated March 24th, 1888.

W. H. DICKSON,
BENNETT, KIRKPATRICK & BRADLEY,
Attorneys for Defendant.

Endorsed: Title of court and cause. Notice of appeal. Due service accepted of this notice 26th day of March, 1888. E. T. Sprague, attorney for plaintiff. Filed March 26th, 1888. Henry G. McMillan, clerk.

48 (Title.)

Undertaking on Appeal.

Whereas the defendant, The Wasatch Mining Company, a corporation, is about to appeal to the supreme court of the Territory of Utah from the judgment entered in the said district court in the

above-entitled action on the 30th day of July, 1887, in favor of plaintiff and against the said defendant, and also from the order of said court made on the 7th day of February, 1888, overruling defendant's motion for a new trial herein: Now, therefore, in consideration of the premises and of said appeal, we, James Jack and W. A. Rossiter, of Salt Lake City, Utah Territory, do hereby jointly and severally undertake and promise, on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against it on said appeal or on a dismissal thereof, not exceeding three hundred dollars, in which amount we acknowledge ourselves jointly and severally bound.

Witness our hands and seals this 27th day of March, 1888.

(Signed) JAMES JACK. [SEAL.]
" W. A. ROSSITER. [SEAL.]

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

The sureties on the foregoing undertaking, being duly
49 sworn, each for himself says that he is a resident and freeholder within said Territory and is worth the sum specified in the foregoing undertaking over all his debts and liabilities, exclusive of property exempt from execution.

JAMES JACK.
W. A. ROSSITER.

Subscribed and sworn to before me this 27th day of March, 1888.

[SEAL.] L. MOTH IVERSON,
Notary Public.

Endorsed: Title. Undertaking on appeal. Filed March 27th, 1888. Henry G. McMillan, clerk.

Certificate of Clerk.

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

I, Henry G. McMillan, clerk of the third judicial district court of Utah Territory, do hereby certify that the foregoing is a full and correct copy of the judgment-roll, notice, and undertaking on appeal in case of Crescent Mining Company *v.* Wasatch Mining Company.

[SEAL.] Witness my hand and seal of said court, at Salt Lake City, this 24th day of May, 1888.

(Signed) HENRY G. McMILLAN, *Clerk.*

50 In the Supreme Court of Utah T'y.

At a session of said court held on the 14th day of June, 1888.

Present and presiding: The Hon. Charles S. Zane, chief justice, and Hons. J. S. Boreman and H. P. Henderson, associate justices.

THE CRESCENT MINING COMPANY, Respondent,
vs.
THE WASATCH MINING COMPANY, Appellant. } Appeal from 3rd District.

This cause, coming on regularly for hearing, was argued by Mr. Kirkpatrick for appellant and Mr. Baskin for respondent. Pending further argument, court adjourned till June 15th, 1888, at 10 o'clock.

In the Supreme Court, Utah.

FRIDAY, *June 15th*, 1888.

Present: All the justices.

THE CRESCENT MINING COMPANY, Respondent,
vs.
THE WASATCH MINING COMPANY, Appellant. } Appeal from 3rd District.

This cause was further argued by Mr. Baskin for respondent, by Mr. Kirkpatrick in reply, submitted, and taken under advisement.

51 In the Supreme Court of Utah T'y.

At a session of said court held on the 27th day of Aug., 1888.

Present and presiding: Hon. Charles S. Zane, chief justice, and Hons. J. S. Boreman and H. P. Henderson, associate justices.

THE CRESCENT MINING COMPANY, Respondent,
vs.
THE WASATCH MINING COMPANY, Appellant. } From 3rd District.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here ordered, adjudged, and decreed that the judgment of the district court therein be, and it is hereby, affirmed; also that respondent have and recover of and from appellant its costs herein.

Time for filing a petition for a rehearing of this cause is hereby extended to include ten days after the filing of the opinion herein; remittitur meantime to be stayed.

52 In the Supreme Court of Utah Territory.

THE CRESCENT MINING COMPANY, Plaintiff and Respondent,
vs.
THE WASATCH MINING COMPANY, Defendant and Appellant.

Appeal from the third district.

Appearances: W. H. Dickson, J. G. Sutherland, and Bennett, Kirkpatrick & Bradley, for appellant; R. N. Baskin and P. L. Williams, for respondent.

HENDERSON, *J.*:

The complaint in this case is filed to obtain a reformation of a deed made Sept. 1st, 1886, by the defendant to the plaintiff so as to

include 2.55 acres of ground not included therein. The premises in dispute are located in the Uintah mining district and are part of what is known as the "Walker & Walker Extension" and "Buckeye mining claims" as located. The material facts, as shown by the pleadings and testimony, are as follows: The Walker and Walker Extension and Buckeye mining claims were first located as contiguous and adjacent properties. Thereafter what is known as the "Pinyon and Pinyon Extension mining claim" was located and diagonally traversed one end of the said Walker and Walker
53 Extension and Buckeye claims, thereby creating an interference with said last-named claims, the area of such interference being 2.55 acres of land and being the premises here in dispute.

The owners of the Pinyon & Pinyon Extension claim first made application for their patent, which was issued to them Oct. 18th, 1873, describing the property by metes and bounds, and by mistake and inadvertence the said application and the patent also included the said area of interference which belonged to the Walker and Walker Extension and Buckeye claims. After such location of said Walker and Walker Extension and Buckeye claims the owners thereof incorporated and thereby formed the defendant company and transferred by such incorporation said mining claims to said defendant. Thereafter the defendant made application for patents to its said claims; whereupon the said mistake in the application and patent to the owners of the Pinyon and Pinyon Extension claim was discovered, and the defendant at once made claim to the owners of the Pinyon and Pinyon Extension and asserted their ownership and right to the area of interference, and this claim and right was acknowledged; and to correct said mistake in such application and patent the owners of said last-mentioned claim, on the 28th day of Oct., 1874, conveyed to the defendant company, by deed, said area of interference, describing the same by metes and bounds, stating a consideration of $1.00, and containing the following provisions: "The premises hereby intended to be conveyed is the area shown on the diagram hereto attached, being
2.55 acres, more or less, and being the ground whereon
54 conflict exists between the claim of said Pinyon and Pinyon Extension and the Buckeye and Walker & Walker Extension mining claims, the said premises having been by inadvertence granted to said first parties by the Government of the United States by patent; * * * and whereas the premises hereby conveyed being the ground included within the lines of the said Pinyon and Pinyon Extension and the said Buckeye and Walker & Walker Extension claims, were never intended to be applied for by the applicants for patents on said Pinyon and Pinyon Extension claim; and whereas it has been supposed that said conflict grounds are included in said patent, now it is the sole object and intent of this instrument and the parties hereto to release and quitclaim to said second parties, the rightful claimants and owners of said conflict ground, whatever right, title, or interest may have been inadvertently acquired by

the patentees under said patent in and to said premises in conflict."

After receiving such deed, and on the 6th day of Nov., 1874, the defendant made application for and a patent was thereupon issued to it, first describing said claims as located by metes and bounds and then accepting from the operation thereof the portion before that time patented to the owners of the Pinyon and Pinyon Extension, being the area of interference, which patent it received, thereby perfecting its title to its claims as they were located.

The owners of the said Walker & Walker Extension and Buckeye claims were in the actual occupancy of said claims as located until the creation of said defendant company, and the said defendant,
55 from the time of such incorporation, commenced and prosecuted mining operations thereon; that, as a consequence, the said defendant became largely indebted, and finally, about the year 1879, William Jennings, who was one of the incorporators of the said defendant and owned 1,500 shares of its capital stock, and his son, one Jos. A. Jennings, took entire possession of said last-named mines, including said area of interference, and began to work and operate them on their own account, claiming to own the same.

In the meantime some of said claims against said defendants passed into judgments, its interest in the claims being levied upon by virtue of executions issued thereon. The same was sold by the marshal, and bid in by the said William Jennings. The discovery points of both said claims, and the surface workings or entries to the veins of mineral therein, were at all times wholly within the area of interference. The said William and Joseph A. Jennings continued to operate said mines until January 24th, 1883, when the defendant company commenced an action in the third district court against them, and in their complaint in said action described the said Walker and Walker Extension and Buckeye claims as located, including the area of interference, and alleged that the defendants therein were in possession of said property, operating the same, and had taken a large amount of valuable ore therefrom, and averred that the said defendants therein had taken possession of said property by virtue of an agreement between them and the plaintiff therein, to the effect that they should take possession of said property, operate the same, and from the proceeds thereof pay claims
56 against said plaintiff, and that advances made by said defendants to pay indebtedness should be a lien upon such property and a preferred indebtedness, and that defendants, under such agreement, should and might purchase said property on execution sales and hold the same in trust for said plaintiff, and further averred that said defendants had made purchases at execution sales pursuant to such agreement and held the property in trust for plaintiff; that defendants had extracted mo-e than sufficient ore to remunerate them for all advances, but refused to convey said property, and claimed to own the same, and denied plaintiff's right thereto. The marshal's deeds on such sales described the property as the "Walker and Walker Extension" and "Buckeye mining claims," as patented.

The complaint prayed that the plaintiff therein be decreed to be the owner of the property and for an accounting. The defendants therein answered, admitting their possession and claim of ownership to the entire premises; denied the agreement stated in the complaint; averred that the plaintiff had abandoned said property as unprofitable; that they had purchased at the marshal's sale in their own right, and that they were the owners of the property. In that case the discr-pancy between the descriptions "as located" and "as patented" does not seem to have been mooted or suggested.

In the meantime and prior to the commencement of said action the plaintiff herein, The Crescent Mining Company, had become the owner of the Pinyon and Pinyon Extension claim and of various other claims located adjacent to and entirely surrounding the property so owned by said Wasatch Mining Company and were
57 mining and operating thereon, and, being such owners, it was desirous of purchasing said Walker and Walker Extension and Buckeye claims as located, and, it being in dispute and litigation between said Wasatch Mining Company and said William and Joseph A. Jennings and uncertain as to which would be adjudged to be the owners thereof, the plaintiff herein, by its officers, conceived the idea of having both of said parties to said litigation agree with it upon a price for said property and to receive such price and let the same abide the event of such litigation, and thereby obtain the title to said property pending such litigation; and to effectuate this plan said plaintiff first negotiated with the Jennings party, and such negotiations were had that the price of $5.00 per share of the capital stock of said Wasatch Mining Company, amounting to $50,000, was agreed upon between plaintiff and the Jennings party as the purchase price of said property, and said William Jennings being the owner of 1,500 shares of the capital stock of said Wasatch Mining Company, to which he would be entitled if the Wasatch Mining Company succeeded in said litigation, and agreement was finally perfected on the 8th day of March, 1883, between the plaintiff and the Jennings party.

The said William and Joseph A. Jennings on that day made a deed to the plaintiff, the consideration expressed therein being $50,000, describing all of said property, including the area of interference or disputed ground, by metes and bounds, and following such description was the following provision: "The said described
58 premises being mineral entries Nos. 37 and 88, lots 40 and 41, and patented as the "Walker Extension" and "Buckeye mining claim." At the same time, and as part of the same transaction and bearing the same date, they entered into a written contract which recited the making of the deed on that day, and referred to it for a description of the premises affected by the contract, and also cited the pendency of said action between said Wasatch Mining Company and the said William and Joseph A. Jennings, and that the said title involved the title to said land. It provided that the contract and the deed should be deposited with the Deseret National bank, subject to the following conditions: That as soon as said action should be determined, if such determination was

in favor of said William and Joseph A. Jennings and the title thereby vested in them, the said plaintiff should pay the said Jennings $42,500, the balance of the purchase price of said lands, $7,500 thereof having been paid, that being the ampunt represented by stock owned by William Jennings, and upon such payment the plaintiff to receive said deed. It further provided that if at any time the Jennings should indemnify plaintiff against the claim of the Wasatch Mining Company that payment of $42,500 should be made and the deed delivered, and that if at any time the plaintiff should obtain a conveyance from the Wasatch Mining Company or a waiver of its claim payment should be made and the deed delivered; that plaintiff might at once enter into possession, but should not remove any ores until the delivery of the deed.

59 At the same time of making this contract, and as a part of the same transaction, William Jennings transferred and delivered to the plaintiff his said 1,500 shares of the capital stock of said Wasatch Mining Company. At once, after the making of this contract, the plaintiff entered into possession of all the property, including the disputed premises, and has remained in possession. Thereupon the plaintiff commenced to negotiate with said defendant, conducting negotiations on its part by one E. P. Ferry, one of its directors, its president and most of its directors residing in Michigan, the negotiations being conducted mostly on the part of the defendant by J. G. Sutherland, its attorney. Various negotiations were had, which resulted in an arrangement with defendant on the bases of the Jennings contract, and on the 9th day of July, 1886, the parties hereto entered into a contract (the defendant being the first party and the plaintiff the second party thereto), a portion of which contract is as follows: "Said party of the first part, in consideration of the agreement on the part of the second party hereafter set forth, hereby agrees with said second party, its successors and assigns, to join with the representatives and successors in interest with William Jennings, conveying to the said second party these two patented mining claims, situated in Uintah mining district, Summit county, Territory of Utah, called the "Walker and Walker Extension" and "Buckeye mining claim," in fee, according to the contract heretofore made between said second party and William Jennings in his lifetime, on payment into the

60 district court for the third judicial district of said Territory, subject to an order of the court in an action in which said first party is plaintiff and said representatives of William Jennings and others are defendants, with effectual assurance by said second party that 1,500 shares of first party's capital stock held by said Jennings and transferred by him at the making of said contract to said second party shall not participate in the distribution by said first party of said sum of $42,500, or that, in default of such joint conveyance, said first party will convey in fee said property to said second party after the final determination of said suit, if said first party shall be decreed to be the owner thereof, on payment to said first party of said sum of $42,500 and said assurance relative to said 1,500 shares of said first party's capital stock as aforesaid."

The contract further provided that, upon receiving such deed, the plaintiff should make payment and give assurance regarding the participation of said 1,500 shares of stock. Afterwards, on the 1st day of September, 1886, for the purpose of executing the said contract, the defendant made and delivered to the plaintiff a deed (the one sought to be reformed) describing the property as follows: "Those patented mining claims, situate in Uintah mining district, in said county and Territory, named respectively the "Walker and Walker Extension mine-," as described in patent from the United States to said party of the first part, dated November 6th, 1874, and recorded in the office of the recorder of said county, in Book E, on pages 19 to 26, and also the "Buckeye mine," as described in
61 patent from the United States to the said party of the first part, dated November 6th, 1874, and recorded in the office of said recorder of said county, in Book E, on pages 27 to 34;" and the plaintiff executed and delivered to defendant a mortgage covering its entire group of mines and the property covered by the deed, described as it was described in the deed, conditioned for the payment to defendant of the amount unpaid whenever it became entitled to it, and, having secured to the Jennings party, to their satisfaction, payment in case they became entitled to it, their deed was delivered to plaintiff, and, being in possession, the plaintiff began operations on said property.

Afterwards, having learned that the Wasatch Mining Company made some claim to the disputed ground or was offering it for sale, the plaintiff commenced this action. The complaint, as amended, recited the facts before stated with particularity, except the fact of the defendant's receiving the mortgage given to it as full execution of the contract on the plaintiff's part. It avers that the lands in dispute were included in the description in the contract between plaintiff and defendant by adopting the description in the Jennings contract, and that it was intended to be so included, and that by the mistake and inadvertence of the plaintiff and the fraud and concealment of the defendant the deed was so drawn as to exclude it.

The defendant filed an answer and cross-complaint, denying that in making the contract and deed it was the intention to include the disputed property and denying that it was included in the terms of the contract, but that, on the contrary, the whole negotia-
62 tions were only for the property outside of the disputed property, and avers the facts relating to the giving and receiving of the mortgage, and avers that by the giving of the mortgage covering and describing the property as described in the deed the plaintiff is estopped. A trial was had in the district court of these pleadings and a decree entered for the plaintiff.

The defendant insists that the complaint does not state a case entitling the plaintiff to any relief, and that therefore the decree should be reversed. The claim is that by the terms of the contract between the parties, as set forth in the complaint and shown in evidence, the plaintiff was not entitled to a deed at the time of bringing the action; that the conditions upon which the deed was to be delivered had not yet been performed; and that, if the plaintiff re-

lied upon the fact that the defendant had accepted other conditions than those named in the contract as a fulfillment thereof on its part, this agreement should have been specifically set forth in detail. The complaint does aver that the deed was given by the defendant in execution of the contract on its part. This would imply that the contract had either been fully performed on part of the plaintiff or that defendant had accepted other conditions satisfactory to it in lieu thereof.

The defendant did not demur, but by its answer and cross-complaint brought before the court all the facts, and no objection was taken to the evidence. Under these circumstances the defendant should have raised the question in the court below, where ample power is given to correct and amend the pleadings, and
63 having itself brought the facts before the court by its pleadings, and without objection gone to trial on its merits, it would be too late to raise the question for the first time in this court. Tyng *v.* Warehouse Co., 58 N. Y., 308; Marshall *v.* Ferguson, 23 Cal., 66.

The facts, as stated in the answer and cross-complaint and shown by the evidence, conclusively show that the written contract between the parties was not annulled or a new one substituted, but that it was attempted to be executed, the defendant simply accepting other conditions than those stipulated in its favor and attempting to execute the contract on its part by delivering the deed as provided therein, substantially as averred in the complaint. A party to a contract may always dispense with the performance of a condition in his favor, and when this is done it is the same as though the thing dispensed with had been done. 1 Add. Cont., sec. 324; Jones *v.* Barkley, 2 Doug., 684.

We do not think the objection is well taken.

The next question for our consideration is as to whether by the terms of the contract between the parties the disputed premises were included. It will be remembered that this contract for a description of the premises to be conveyed referred to and adopted the Jennings contract. That contract consisted of the written undertaking and deed accompanying it, the undertaking referred to and adopting the description in the deed. Where a grant of property refers to another instrument for a description of the property granted, it is regarded as of the same effect as though the description in
64 the instrument referred to were copied into the grant. 3 Washb. Real Prop., pp. 458–460, secs. 54, 55; Vance *v.* Fore, 24 Cal., 436; 2 Devl. Deeds, sec. 1020. The contract is therefore to be construed as though the description contained in the Jennings deed was written into it. That deed first describes the property definitely and minutely by metes and bounds and includes the property in dispute, and as a further description describes it as "Mineral entries Nos. 87 and 88, lots 40 & 41, and patented as the "Walker and Walker Extension" and "Buckeye mining claims."

Mineral entries Nos. 87 and 88, lots 40 and 41, include the land in controversy. The Walker and Walker Extension and Buckeye mining claims, as patented, do not include it. The latter descrip-

tion is therefore indefinite, uncertain, and contradictory. In making the description in this deed no doubt the parties did not have in mind the error in patenting a part of these claims to the owners of the Pinyon and Pinyon Extension claim and the consequent difference between the claims as located and as patented.

When a grant contains two descriptions of the same property and one is complete, definite, and intelligible and the other is indefinite, contradictory, and uncertain, in construing the grant the former will control. 2 Devl. Deeds, sec. 1038; Driscoll *v.* Green, 59 N. H., 101; 2 Devl. Deeds, sec. 1041. Another rule of construction is that where a grant contains an uncertain description, or it contains two descriptions which do not coincide, that construction most favorable to the grantee will be adopted. 3 Washb.
65 Real Prop., pp. 418, 420, secs. 32, 33. With the aid of these elementary rules of construction, we have no doubt that the contract by its terms covered the whole land, including the land in question; and it is equally clear that the deed sought to be reformed does not convey the lands in dispute as provided by the contract.

The defendant claims that notwithstanding this no reformation of the deed should be decreed, because, first, all the negotiations between the parties relative to the purchase and sale was only as to the lands aside from those in dispute, and was carried on with reference to that only; second, that it was not intended by the parties to include either in the contract or deed the disputed premises; third, that the plaintiff accepted the deed knowing that it did not include the disputed grounds and gave back a mortgage adopting that description.

If these propositions were established it would no doubt be good cause for withholding relief; but we think the testimony establishes the following propositions beyond reasonable doubt: First, that all the negotiations between the parties up to the time the contract was made were with reference to the entire property, including that in dispute, and was so understood by both parties; second, that it was intended by both parties to include the disputed premises in that contract; third, that it was the intention of the plaintiff at the time of receiving the deed to have the disputed premises conveyed to them as provided in the contract, and it was their understanding that the deed did so convey it; fourth, that this intention and understanding was well known to the defendant at the time of executing and delivering the deed.

66 The testimony shows that the property (including that in dispute) was all the property owned by the defendant and had always been known and commonly designated as the "Walker and Walker Extension" and "Buckeye mining claims;" that the discovery points of both claims were within the disputed grounds; that maps and plats were used by the parties in their negotiations plainly indicating this; that the price agreed upon both with the Jennings party and with defendant was at the rate of five dollars per share of the capital stock of defendant, and this capital stock represented the entire property.

In the negotiations the property was often referred to as the property in litigation in the case of the Wasatch Mining Company against Jennings, and it is argued by the defendant that that case only involved the title to the property outside of the property in dispute; but we have no doubt that in these negotiations all the parties regarded this entire property as being in dispute in that case. The reference of the parties to it was not with reference to the technical legal attitude of the case, but as to what was involved in the litigation, and this property was so involved.

It is said that the defendant and its officers did not know at the time the contract was made what the particular description was in the Jennings contract, to which they refer, never having seen it. This may be true, but the reference to it in ignorance of its provisions can only be explained upon one theory—that, intending to convey the entire property owned by defendant, the description was immaterial so far as it was concerned.

67 The fact, as testified by Woodmansee and other directors of the defendant, that the price was $50,000, deducting the shares of stock already owned by plaintiff, leaving $42,500 to be paid, conclusively shows what property was being bought and sold. The shares of stock represented an interest in all the property. In the dealing between the parties this was considered as so much of the property respecting which they were negotiating as already belonging to the plaintiff, and that they were dealing with respect to the balance thereof, and hence the provision in the contract that these shares should not participate in the distribution of the $42,500. There is no doubt that the plaintiff and its officers had not in mind (if they ever knew) the mistake in originally patenting these claims and the consequent distinction between the claims as located and as patented, and if the defendant, taking advantage of their ignorance and concealing this fact, has imposed upon them a deed which does not convey what they purchased, it is proper that the deed should be so reformed as to include it.

2 Pom. Eq. Jur., pp. 343, 344, sec. 870; 1 Devl. Deeds, sec. 152; Bisp. Eq. Marg., p. 459; Wellas *v.* Yates, 44 N. Y., 525.

The judgment of the district court should be affirmed.
Zane, Ch. J., and Boreman, J., concurring.

Endorsed: In the supreme court of Utah. Crescent Mining Co. *vs.* Wasatch Mining Co. Opinion. Filed Aug. 27th, 1888. E. T. Sprague, clerk.

68 Supreme Court, Utah Territory.

WEDNESDAY, *Nov. 28th*, 1888.

Present: All the justices.

THE CRESCENT MINING COMPANY, Respondent,
vs.
THE WASATCH MINING COMPANY, Appellant. } Appeal from 3rd District.

A petition for the rehearing of this cause having been duly considered, it is ordered such rehearing be, and the same is, overruled and denied.

Thereupon said appellant, by its counsel, W. H. Dickson, prayed the allowance of an appeal from the judgment of this court heretofore entered in this cause to the Supreme Court of the United States, and asked that the amount of a bond to be given on such appeal be now here fixed; on consideration whereof it is hereby ordered that said appeal be, and is hereby, allowed, and the amount of a penal sum of a bond thereon be and is fixed at five hundred dollars.

69 By the Honorable Charles S. Zane, chief justice of the supreme court of Utah Territory.

To the Crescent Mining Company, a corporation:

Whereas the Wasatch Mining Company, a corporation, has lately appealed to the Supreme Court of the United States from a judgment and decree lately made, rendered in the supreme court of Utah Territory in favor of you, the said The Crescent Mining Company, and has filed the security required by law, you are therefore hereby cited to appear before the Supreme Court, at the city of Washington, on the 14th day of October next, to do and receive what may pertain to justice to be done in the premises.

Given under my hand, at the city of Salt Lake, in the Territory of Utah, the 27th day of August, in the year of our Lord one thousand eight hundred and eighty-nine.

C. S. ZANE,
Chief Justice of the Supreme Court of Utah Territory.

69½ [Endorsed:] In the Supreme Court of the United States. The Crescent Mining Company, plaintiff & respondent, *vs.* The Wasatch Mining Company, defendant & appellant. Citation. Due service of a copy of the within citation admited August 27, 1889. R. N. Baskin, attorney for respondent. Filed August 27, 1889. Jos. P. Bache, clerk.

70 *Assignment of Errors.*

Supreme Court of the United States.

THE WASATCH MINING COMPANY, Appellant,
v.
THE CRESCENT MINING COMPANY, Respondent.

Now comes the appellant above and upon the record and proceedings of the supreme court of Utah Territory assigns the following errors:

First. The court erred in its statement or findings of fact wherein it is stated and found that the deed bearing date September 1st, 1886 (being the deed from the Wasatch Mining Company to the Crescent Mining Company), was by mistake or inadvertance so drawn as to omit therefrom the premises which had been patented by the United States to James Lowe and others as part of lot 42, called the Pinyon and Pinyon Extension mining claim (being the premises secondly described in the bill of complaint), because such statement or finding of fact is not within the issues tendered by said complaint or made by the pleadings. The complaint charges active fraud as the basis for the relief prayed and charges and alleges in the
71 most direct and positive manner that the omission of said premises from said deed was due to a conspiracy between certain officers and agents of the appellant (defendant below) and one E. P. Ferry, an agent of the respondent (plaintiff below), to defraud the plaintiff by omitting the same from said deed. Nowhere in the complaint is there any intimation that such omission was the result of mistake or inadvertance.

Second. The court erred in its statement or findings of facts wherein it is stated and found that said deed was made in pursuance of a contract between the parties of July, 1886 (being the contract whereof a copy is annexed to the complaint and marked Exhibit "C").

It is apparent on the face of said contract, Exhibit "C," read in the light of the allegations of the complaint, that said deed could not have been made in pursuance thereof, because by the terms of said contract, in default of the joint conveyance therein provided for (and it appears from the complaint itself that there was such default), no deed was to be given by the Wasatch Mining Company to the Crescent Mining Company until the suit mentioned in the contract should have been determined in favor of said Wasatch Company, nor until the Cresent Company should pay to the Wasatch Company the purchase price, $42,500, and it appears from the complaint that said suit was not yet determined, nor any part of said sum paid or tendered, even at the time this action was commenced.

72 Third. The court erred in adjudging and decreeing that the Wasatch Mining Company should forthwith, upon demand therefor, execute and deliver to the Crescent Mining Company a deed granting and conveying to the latter the premises described

in the decree (being the premises first described in said complaint), because upon the face of the complaint it appears that at the time this suit was commenced the plaintiff therein was not entitled to have or demand from defendant a deed for any portion of the said premises. Plaintiff by its complaint sought a reformation of said deed of September 1st, 1886 (whereof a copy is annexed to said complaint and marked Exhibit "D"), so as to make it embrace all of the premises first described in said complaint. From the complaint it appears that the right to such relief was based upon the alleged fact that by the contract of July, 1886, said Exhibit "C," the parties had contracted for a conveyance of all said premises, but through fraud and collusion between agents of the defendant and E. P. Ferry, an agent of plaintiff, that portion of said premises secondly described in the complaint was fraudulently omitted from said deed. According to the allegations of the complaint, it appears that the plaintiff's right to any deed must rest upon said contract, Exhibit "C," while by the terms of said contract, read in the light of the allegations of the complaint, it appears that at the time this suit was commenced plaintiff was not entitled to demand any deed, and this for the reasons specified in the second assignment of error herein.

73 (Signed) CHARLES W. BENNETT,
Solicitor for Appellant Herein.

Endorsed: Supreme Court of the U. S. Title: "Assignment of errors." Filed in the office of the clerk of the supreme court of Utah Sept. 12th, 1889. Jos. P. Bache, clerk.

74 In the Supreme Court of Utah Ty.

THE CRESCENT MINING COMPANY, a Corporation, Plaintiff and Respondent,
vs.
THE WASATCH MINING COMPANY, a Corporation, Defendant and Appellant.

Know all men by these presents that we, James A. Lowe and James Glendinning, of Salt Lake City, Utah Territory, as sureties, are held and firmly bound unto The Crescent Mining Company, the respondent named, and to its successors and assigns, in the sum of five hundred dollars, to be paid to the said The Crescent Mining Company, its successors and assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, administrators, and assigns, firmly by these presents.

Sealed with our seals. Dated this the 27th day of August, 1889.

Whereas the above-named The Wasatch Mining Company hath taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled action by the supreme court of Utah Territory: Now, therefore, the condition of this obligation is such that if the above-named The Wasatch Mining Com-

pany shall prosecute its said appeal to effect and answer all
75 costs if it shall fail to make good its appeal, then this obligation shall be void; otherwise to remain in full force and virtue.

GEORGE A. LOWE.
JAMES GLENDINNING.

Signed, sealed, and delivered in presence of—
W. P. LYNN.

Approved by—
CHARLES S. ZANE,
Chief Justice Supreme Court Utah Ty.

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

George A. Lowe and James Glendinning, whose names are subscribed as sureties to the foregoing undertaking, being each duly and severally sworn, each for himself says that he is a resident of said county of Salt Lake and the Territory of Utah; that he is worth the amount specified in said undertaking as the penalty thereof over and above all his just debts and liabilities, exclusive of property exempt from execution.

GEORGE A. LOWE.
JAMES GLENDINNING.

Subscribed and sworn to before me this 27th day of Aug., 1889.
W. P. LYNN,
Notary Public, Salt Lake County, Utah Ty.

Endorsed: In the supreme court, Utah Territory. Crescent Mining Company, plaintiff and respondent, *v.* Wasatch Mining Company, defendant and *respondent.* Appeal bond. Filed Aug. 27th, 1889. Jos. P. Bache, clerk.

76 In the Supreme Court of Utah Territory.

THE CRESCENT MIN'G COMPANY, Respondent, }
vs.
THE WASATCH MINING COMPANY, Appellant. }

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

William M. Bradley, being first duly sworn, deposes and says: I am one of the directors and duly appointed, qualified, and acting secretary of the defendant above named, The Wasatch Mining Company; that the matter in dispute in said action, exclusive of costs, does now and at the time of the commencement of said action did exceed the sum of five thousand dollars in value and is of the value of, to wit, fifty thousand dollars.

WILLIAM M. BRADLEY.

Subscribed and sworn to before me this 26th day of Aug., 1889.

WILLIAM P. LYNN,
Notary Public, Salt Lake County, Utah.

Endorsed on cover: In the supreme court, Utah. The Crescent Mining Company, plaintiff, *vs.* The Wasatch Mining Company, defendant. Affidavit of value. Filed August 27th, 1889. Jos. P. Bache, clerk.

77 UNITED STATES OF AMERICA, *Territory of Utah*, } *ss:*

I, Joseph P. Bache, clerk of the supreme court of Utah, in pursuance of an appeal allowed in the case of The Crescent Mining Company, a corporation, *vs.* The Wasatch Mining Company, a corporation, lately pending in said court, do return attached hereto a transcript of the record and proceedings, opinion, appeal bond, affidavit of value of matter in dispute, assignment of errors, together with the original citation, all in and of said court and cause, to the Supreme Court of the United States; and I hereby certify that said attached transcript of said record and proceedings, opinion, bond, assignment of errors, and affidavit is a full, true, and complete copy of the several originals thereof on file or of record in my office.

In witness whereof I hereunto set my hand and affix the seal of the supreme court of Utah Territory this 18th day of September, A. D. 1889, at Salt Lake City, Utah.

Seal Supreme Court, Territory of Utah, United States of America.

JOSEPH P. BACHE,
Clerk of the Supreme Court of Utah.

Endorsed on cover: Case No. 13,715. Utah Territory supreme court. No. 135. The Wasatch Mining Company, appellant, *vs.* The Crescent Mining Company. Filed October 10, 1889.

135 148 U.S. 293

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

THE WASATCH MINING COMPANY,
Appellant,
vs.
THE CRESCENT MINING COMPANY,
Respondent

APPELLANT'S BRIEF.

CHARLES W. BENNETT,
Solicitor for Appellant.

R. N. BASKIN,
Solicitor for Respondent.

Star Printing Co., Salt Lake.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term.

THE WASATCH MINING COMPANY,
Appellant,
vs.
THE CRESCENT MINING COMPANY,
Respondent.
No. 135.

APPELLANT'S BRIEF.

This suit was brought to reform a deed made by appellant to respondent so as to make it embrace and include certain premises claimed by respondent to have been fraudulently omitted from the deed.

The case was heard upon the amended complaint and answer thereto and the proofs of the respective parties. A decree was entered in the trial court granting to respondent the relief prayed for in its bill of complaint.

From this decree an appeal was taken to the Supreme Court of the Territory and the decree was there affirmed.

The premises claimed by respondent to have been fraudulently omitted from the deed in question is the area in conflict between the Pinyon and Pinyon Extension, Lot 42; and the Walker and Walker Extension, Lot 40, and Buckeye, Lot No. 41, as shown upon the plat found in the Record at page 10.

The material allegations of the complaint are as follows: (1)—That on and prior to the 18th day of October, 1873, the defendant in the court below (the appellant here) was the owner

and in the possession of the Walker and Walker Extension and the Buckeye mines, (describing them by courses and distances, and it will be observed that the description first given in the complaint embraces the conflict area aforesaid).

(2) That while defendant was so the owner and in possession of the whole of said mining claims as so described, James Lowe and others, owners of the Pinyon and Pinyon Extension mine, applied for and obtained a patent for the last named mine, bearing date October 18th, 1873. That the Pinyon and Pinyon Extension, as the same was located, overlapped and conflicted with the Walker and Walker Extension and Buckeye mines. That by mistake in said application for patent the same included a portion of the Walker and Walker Extension and Buckeye mines, and that said patent to said Lowe and others included a portion of the Walker and Walker Extension and Buckeye mines, (describing said portion, which it will be observed is the aforesaid conflict area.)

(3) That that portion of the Walker & Walker Extension and Buckeye mines so included in said patent was at all times known, understood and recognized by all of the owners and parties interested in each of said three mines to belong to and constitute a part of said Walker & Walker Extension and Buckeye mines. That the discovery point of each of the said mines, namely, the Walker & Walker Extension and Buckeye mines is included within the boundaries of said conflict area, and that in recognition of the rights of said defendant to said conflict area and to correct the errors in said application and patent, the patentees on or about the 28th of October; 1874, conveyed said conflict area to said defendant.

(4) That subsequently William Jennings, since deceased, and Joseph A Jennings went into possession of said Walker and Walker Extension and Buckeye mines, including said conflict area, claimed to be the owners of the whole thereof, and continued in the possession of the whole of said premises under claim of ownership, until the 8th of March, 1883.

(5) That after said William and Joseph A. Jennings went into possession of said property, the defendant, the Wasatch Mining Company, prior to the 8th of March, 1883, brought a suit in the Third District Court of Utah against said William and

Joseph A. Jennings, and one Isaac Jennings, *which suit is still pending in said court* (Record page 3), and involves the title and ownership of said mining property and premises.

(6) That on the 8th of March, 1883, and while said action was pending, said William and Joseph A. Jennings, for the sum of $50,000, executed and deposited with the Deseret National Bank a deed by which they conveyed to the plaintiff, the Crescent Mining Company (respondent here), the whole of said Walker and Walker Extension and Buckeye mines, including said conflict area. (A copy of said deed was attached to said complaint, marked "Ex. A," and will be found in the Record, pages 8 and 9).

(7) That at the time said deed was executed, and as a part of said transaction and sale, the plaintiff, the Crescent Mining Company, as party of the first part, and the said William and Joseph A. Jennings, as parties of the second part, entered into an agreement in writing, by which (after reciting the execution of said deed and pendency of said action) it was mutually agreed between the parties that said deed and agreement should be deposited in said bank and there held subject to the terms and conditions contained in said agreement; that is to say, that whenever and as soon as said action and the subject matter therein involved should be finally determined, if such determination should be favorable to the defendants in said action (the Jennings), said first party should pay to said second party the sum of $42,500.00; $7,500.00 the balance of said $50,000.00 having been paid at the time of signing said agreement, and that upon payment of said sum of $42,500.00 said deed should be delivered and accepted by said first party. That said agreement also contained a provision that if at any time before the final determination of said action, and after three months from the date of said agreement, said second parties should execute and deliver to said first parties their written agreement to save it harmless from all claims of the Wasatch Mining Company to the title and ownership of said property, the same should be accepted by said first party, and it should then, after thirty days' notice, pay said balance of said purchase money. That it was further provided in said agreement that said first party should take immediate possession of said property, but should not, until

the delivery of said deed, extract or remove any ore therefrom. (A copy of said agreement, marked Ex. "B," was attached to the complaint, and will be found in the record, pages 10 and 11).

(8) That the powers of the plaintiff company are vested in a Board of Directors, who are authorized to direct and control its business and affairs. That at the time of the execution of said deed and agreement, one E. P. Ferry was, and ever since has been and still is a member of the Board of Directors of said plaintiff, the Crescent Mining Co., and during a considerable portion of that period was the president and general manager thereof. That during all said time he was personally familiar with the business affairs of said plaintiff and actively engaged in conducting the same. That he had full knowledge of the execution and deposit in said bank of said deed and agreement at the time the same was done, and the contents thereof, and also knowledge that in pursuance thereof said plaintiff, from March, 1883, had taken possession of the entire property and premises described in and conveyed by the deed so deposited, and had ever since held, occupied and possessed the same and every part thereof pursuant to said deed and agreement.

(9) That said William Jennings died on the 15th of January, 1886.

(10) That in the month of July, 1886, and while said suit of defendant, the Wasatch Mining Company, against said Jennings was still pending and undetermined, the plaintiff and defendant (in this suit) entered into negotiations whereby plaintiff herein sought to have the defendant herein agree to join with the parties claiming title to said property adversely to it in perfecting the title of all said property in said plaintiff, the Crescent Mining Company.

(11) That the said E. P. Ferry, being at the time a member of the Board of Directors of the Crescent Mining Company, and having full knowledge and information of the matters aforesaid, and said Crescent Mining Company, its officers and agents, relying upon said knowledge of said Ferry and confiding in his integrity and honesty, the said Board of Directors appointed him one of a special committee of said Board to conduct and conclude said negotiations on behalf of said plaintiff.

(12) That in pursuance of said negotiations plaintiff and

defendant herein on the 9th day of July, 1886, entered into a contract in which the defendant, the Wasatch Mining Company, was party of the first part, and the plaintiff herein the party of the second part, by which said first party in consideration of the agreement therein contained of said second party, did promise and agree to join with the representatives and successors in interest of said William Jennings in conveying to said second party said Walker and Walker Extension and Buckeye mining claims in fee, according to the contract theretofore made between said second party and the said William Jennings in his lifetime, on payment into said Third District Court, subject to its orders in said action in which said Wasatch Mining Company was plaintiff and said Jennings were defendants, with effectual assurance by said second party that 1500 shares of the first party's capital stock held by said Jennings and transferred by him to said second party, (the Crescent Mining Company) should not participate in the distribution of said $42,500.00; or that in default of such conveyance, said first party should convey in fee said property to said second party, after the final determination of this suit, if said second party should be decreed to be the owner thereof, on payment to said first party of said sum of $42,500.00, coupled with said assurance. That in consideration thereof, said second party, by said agreement, bound itself on receiving a deed as aforesaid to pay said sum of $42,500.00 in the manner above specified and to give said assurance. That by said contract it was further mutually agreed that if said first party should join with the representatives of said William Jennings in conveying said property, and said second party should desire further time to make payment into court of said sum said first party would consent to allow such further time, not to exceed one year, as might then be agreed upon, upon satisfactory security given for said payment. (A copy of said agreement was attached to said complaint, marked "Ex. C," and is found in the record pages 11 and 12.)

(13) That in entering into said agreement it was the understanding and intention of each of the parties thereto to include in said contract the whole of the property contained in the first description set forth in the amended complaint and as described in said deed and agreement between the said Jen-

ningses and the Crescent Mining Company. That at the time of entering into said contract, the parties acting in that behalf made application to said bank to see said contract Ex. "B" for the purpose of obtaining and inserting the full and exact description of said property in said contract (meaning Ex. "C"), but that the said contract, Ex. "B" could not be found, and it was thereupon referred to in said contract, Ex. "C," as the contract of the said William Jennings and the Crescent Mining Company. That no other contract than Ex. "B" ever existed between William Jennings and the Crescent Mining Company.

That at the time of entering into said contract, Ex. "C," said E. P Ferry well knew that the same was understood and intended by both parties thereto to include all the property and premises included in said deed and contract, Exs. "A" and "B" (meaning the Jennings contract and deed to plaintiff), and that the reference to said contract of Jennings was for the purpose of effectuating and carrying out that intention, and in consequence of the fact that the parties acting in that behalf did not at the time have a full and particular description of said property.

(14) That notwithstanding all the facts aforesaid, said E. P. Ferry, while continuing to act in behalf of said plaintiff as such director and member of such special committee, did accept a deed to a portion of said premises so contracted for. (A copy of this deed was annexed to the complaint, marked Ex. "D," and is found in the record, pages 13 and 14.)

(15) "That as plaintiff is informed and believes and thereupon alleges said Ferry in accepting said deed fraudulently combined and conspired with certain of the officers and agents of the said defendant, the Wasatch Mining Company, and other persons to the plaintiff unknown, to cheat, wrong and defraud the plaintiff by accepting said deed as a compliance with and satisfaction of the said contract Ex. "C," and in pursuance of said fraudulent purpose the said Ferry did falsely pretend and represent to the plaintiff and its officers that the said deed was in conformity with the provisions of the said contract between plaintiff and defendant; he then and there, well knowing that the same did not so conform and it did not include that portion of the property and premises hereinbefore described as being the area in conflict between the Pinyon and Pinyon Extension claims

and the Walker and Walker Extension and Buckeye claims and which was covered and included in said contract, Ex. "C," as aforesaid."

"That plaintiff relying on and confiding in the integrity and honesty of said Ferry was deceived and misled by his said representation; that the said deed included all the property contracted for by plaintiff, and thereupon acquiesced in the acceptance of said deed, until the time hereinafter stated, believing the same to so include all of said property.

"At the time of making said contract of July 9, 1886, "Ex. C," the sum of $2500.00 cash was paid by plaintiff to defendant upon the consideration of the purchase of the property so intended to be conveyed and on the delivery of the deed last aforesaid, the payment of the remainder of such purchase money, to-wit: $42,500.00, was by a mortgage of even date with said deed given by plaintiff to defendant upon the entire real property of plaintiff, of value greatly exceeding said last mentioned sum, fully secured to be paid.

"And as plaintiff is informed and believes and upon such information and belief alleges, the said Ferry and said other persons entered into said conspiracy to defraud the plaintiff by omitting the said portion of the said property from the said deed, and afterwards procuring the title thereof himself directly or through some of his said confederates and holding the same adversely to the plaintiff; that in the further prosecution of said fraudulent purpose the said E. P. Ferry, as the plaintiff is informed and believes and alleges the fact to be, has been lately engaged in negotiating with the defendant and certain of its officers to purchase the said property so fraudulently omitted from the said deed, and the said defendant threatens to sell and will sell and convey the said property to the said Ferry or some other person and thereby further cloud the equitable right and title of plaintiff to the said property unless restrained by the order of this Court.

"Plaintiff further alleges that it did not discover the omission in said deed, so accepted on its behalf, until the day of the filing of the original complaint herein, and that its attention was then called to the fact by having then for the first time learned that the said Ferry was about to purchase from the said defendant the said portion of the said property so omitted from the said deed."

"That the said plaintiff has demanded from the said defendant that it correct the said deed so as to include the premises so omitted and make the same conform to the said contract, Ex. 'C,' but the defendant fails and refuses so to do; that all of the said acts of the said defendant and its said officers are in violation of the rights of the plaintiff, and contrary to equity and good conscience, and the said acts of the said E. P. Ferry are in violation of his trust and duty and obligations to the plaintiff as one of its Board of Directors and its special agent to transact the business as aforesaid."

"Wherefore plaintiff prays," etc.

The italics are ours, and all that portion of said complaint within quotation marks will be found in record pages 6 and 7.

The answer is found in the record, pages 14 to 18. It contains a denial: (1) That the exterior boundaries of the Walker, Walker Extension and Buckeye Mines are as set out in the complaint.

(2) Denies that the parcel secondly described in said complaint (being in said conflict area) was any part of the Walker, Walker Extension and Buckeye mining claims, according to the official survey and patent thereof, or was by mistake or erroneously included in said Pinyon and Pinyon Extension patent.

(3) Denies that the parcel last aforesaid was at any time since the making of said official survey and issuing of said patent, known, understood, or recognized by any of the owners or parties interested in each of said claims, or any of them, to belong to or constitute a part of said Walker, Walker Extension and Buckeye mines respectively, and alleges that all such owners and persons interested recognized the same as part of said Pinyon and Pinyon Extension as patented, of which, in fact, it was a part and belonged to defendant by virtue of a deed from the patentees of said Pinyon and not otherwise. Denies that said conveyance from said patentees was made to correct any errors in the application for patent. Denies that William and Joseph A. Jennings, or either of them, in 1879, or at any time, went into possession of the premises so conveyed by said patentees, being the premises now in controversy. Denies that the suit by this defendant against Jennings involved the title and ownership of the parcel in controversy in this action, but only an alleged tres-

pass by them thereon, and alleges that only the title and ownership of said Walker and Walker Extension and Buckeye mining claims as patented was involved in said action; and for want of information or belief sufficient to answer the allegation in the complaint, that while said action was pending said William and Joseph A. Jennings executed and deposited in said bank a deed by the terms of which, they conveyed to the plaintiff herein the whole of the Walker and Walker Extension and Buckeye mining claims, including therein the parcel now in controversy, denies the same; and in like manner denies the execution and deposit of the alleged agreement between the Jenningses and the plaintiff herein, Ex. "B."

Denies on information and belief that the plaintiff herein went into possession of the premises now in controversy, or any part thereof in pursuance of the alleged agreement with the Jenningses, and alleges that if the plaintiff has any possession thereof it acquired no right to take possession thereof from said contract, because the Jenningses had no color of title thereto, and the same was taken without the knowledge or consent of defendant and is a tortious possession. Denies, on information and belief, that said Ferry knew at any time that said plaintiff had or claimed to have possession of any part of the parcel now in controversy. Denies that plaintiff and defendant in July, 1886, or at any time, entered into negotiations whereby the plaintiff sought to have the defendant agree to join with the parties claiming the title and ownership of any property which included the premises in controversy, adversely to defendant in perfecting the title to all said property, including the premises in controversy, in the plaintiff, and alleges that such negotiations were had relative to said Walker and Walker Extension and Buckeye mining claims as patented, but relating to no other property, in whole or in part, and that such negotiations resulted in a contract of which Ex. "C," attached to the complaint, is a copy. Denies that in entering into said agreement it was the intention of either of the parties thereto to include therein the premises now in controversy, or any part thereof, and alleges that it was well known to plaintiff and to said E. P. Ferry, at the time of making said contract, Ex. "C," that said William and Joseph A. Jennings had no title to or in-

terest in or claim on the premises now in controversy and that said negotiations and agreement had no reference whatever thereto.

Denies that said Ferry accepted defendant's deed or ever saw it. Denies that said defendant ever executed any deed pursuant to said contract marked Ex. "C," and attached to said complaint, and alleges that a deed was made to plaintiff by defendant pursuant to a modified bargain, in the negotiation of which said Ferry took no part, and a final agreement between the parties was reduced to writing only in said deed from defendant to plaintiff and in the plaintiff's mortgage for the consideration; that a copy of said deed is attached to said complaint, marked Ex. "D," and a copy of said mortgage is attached to and made a part of said answer, and marked Ex. "B." (Said Ex. "B" is found in the record, pages 18, 19, 20.)

That said deed was delivered to the secretary of plaintiff, C. H. Withey, and the mortgage delivered by him, and avers that said Ferry, charged in said complaint with fraud in connection with the preparation and exchange of said deed and mortgage, was in no way, to the knowledge of defendant, connected with said transaction, and was not present when that part of the business was done. Denies that said plaintiff was deceived or misled by said Ferry's representations relative to said deed or otherwise. Denies that plaintiff was misled or deceived at all, and avers that said deed included all the property intended to be included therein, all the property that was the subject of negotiation and all that either party understood or supposed was to be included therein. Denies all conspiracy with Ferry to withhold, or that there had been withheld from plaintiff any part of the premises negotiated for or agreed by defendant to be sold to plaintiff. Denies that said Ferry made any false representation to plaintiff, or in any manner influenced the plaintiff in the acceptance of said deed or in any acquiescence therein.

The following are the findings of fact and conclusions of law made by the court below:

FINDINGS OF FACT.

1. In July, 1886, said plaintiff contracted to buy of said

defendant, and defendant agreed to sell to plaintiff for a valuable consideration, the following described mining property and premises, situated in Uintah Mining District, Summit County, Utah Territory, bounded, with magnetic variation 17 deg. 20 sec. E., as follows, to-wit (then follows a description of the premises, which include the premises in controversy):

2. In pursuance of said contract a deed was made by defendant to plaintiff, bearing date September 1st, 1886; wherein and whereby, by mistake and inadvertance in describing the property so contracted for and to be deeded, there was omitted therefrom so much of said property and premises as had been patented by the United States to James Lowe and others as part of lot 42, called the Pinyon and Pinyon Extension mining claim.

3. That in making said contract and said deed it was the intention of parties plaintiff and defendant to include the premises and property omitted as last aforesaid, and the purchase price thereof was paid and secured with that of the property deeded.

CONCLUSIONS OF LAW.

Plaintiff is entitled to have its deed from defendant so reformed as to embrace and include in its description of the property to be conveyed all that which is described in the first above finding of fact.

Let judgment and decree be entered accordingly.

C. S. ZANE, *Judge.*

Dated July 30th, 1887.

(See record, pages 22 and 23.)

And a decree was entered pursuant to said findings of fact and conclusions of law.

(See record, pages 23 and 24.)

And upon the record and proceedings the appellant assigns the following errors:

First. The court erred in its statements or findings of fact wherein it is stated and found that the deed bearing date September 1st, 1886, (being the deed from the Wasatch Mining Company to the Crescent Mining Company) was by mistake or

inadvertence so drawn as to omit therefrom the premises which had been patented by the United States to James Lowe and others as part of lot 42, called the Pinyon and Pinyon Extension mining claim (being the premises secondly described in the bill of complaint), because such statement or finding of fact is not within the issues tendered by said complaint or made by the pleadings. The complaint charges active fraud as the basis for the relief prayed, and charges and alleges in the most direct and positive manner that the omission of said premises from said deed was due to a conspiracy between certain officers and agents of the appellant (defendant below) and one E. P. Ferry, an agent of the respondent (plaintiff below), to defraud the plaintiff by omitting the same from said deed. Nowhere in the complaint is there any intimation that such omission was the result of mistake or inadvertance.

Second. The court erred in its statement or findings of facts wherein it is stated and found that said deed was made in pursuance of a contract between the parties of July, 1886 (being the contract whereof a copy is annexed to the complaint and marked Exhibit "C").

It is apparent on the face of said contract, Exhibit "C." read in the light of the allegations of the complaint, that said deed could not have been made in pursuance thereof, because, by the terms of said contract, in default of the joint conveyance therein provided for (and it appears from the complaint itself that there was such default), no deed was to be given by the Wasatch Mining Company to the Crescent Mining Company until the suit mentioned in the contract should have been determined in favor of said Wasatch Company, nor until the Crescent Company should pay to the Wasatch Company the purchase price, $42,500, and it appears from the complaint that said suit was not yet determined, nor any part of said sum paid or tendered, even at the time this action was commenced.

Third. The court erred in adjudging and decreeing that the Wasatch Mining Company should forthwith, upon demand therefor, execute and deliver to the Crescent Mining Company a deed granting and conveying to the latter the premises described in the decree (being the premises first described in said complaint), because upon the face of the complaint it appears that at

the time this suit was commenced the plaintiff therein was not entitled to have or demand from defendant a deed for any portion of the said premises. Plaintiff, by its complaint, sought a reformation of said deed of September 1st, 1886 (whereof a copy is annexed to said complaint and marked Exhibit "D"), so as to make it embrace all of the premises first described in said complaint.

From the complaint it appears that the right to such relief was based upon the alleged fact that by the contract of July, 1886, said Exhibit "C," the parties had contracted for a conveyance of all said premises, but through fraud and collusion between agents of the defendant and E. P. Ferry, an agent of plaintiff, that portion of said premises secondly described in the complaint, was fraudulently omitted from said deed. According to the allegations of the complaint, it appears that the plaintiff's right to any deed must rest upon said contract, Exhibit "C," while by the terms of said contract, read in the light of the allegations of the complaint, it appears that at the time this suit was commenced plaintiff was not entitled to demand any deed, and this for the reasons specified in the second assignment of error herein.

See record pages 36 and 37.

ARGUMENT

We will discuss the second assignment of error first, and submit: The complaint, assuming all its allegations to be true, does not state a case entitling respondent to the relief obtained. This will be perfectly manifest upon a simple reading of the complaint. Argument thereon is scarcely necessary.

Respondent rests its right to call for a deed of the premises involved upon a certain contract between it and the appellant, bearing date July 9th, 1886, a copy of which is annexed to the complaint, marked "Exhibit C." By this contract defendant agreed to convey the premises therein mentioned to the respondent upon a certain contingency and for the consideration therein expressed. It is alleged that this contract was intended by the parties thereto to embrace the premises here in controversy; but that the deed, sought to be reformed, was so drawn as

to omit the same. That this omission was a fraud upon plaintiff, and was the result of collusion between E. P. Ferry, an agent of the respondent and certain officers and agents of the appellant, designed to cheat and wrong the respondent. But the complaint shows upon its face that under the contract of July 9th, the respondent is not yet entitled to demand a deed for anything whatever.

By the terms of that contract, the appellant undertook to join with the representatives and successors in interest of William Jennings in a deed to respondent of the premises therein described *upon the payment into the Third District Court by respondent of the sum of $42,500, subject to the order of said court, in an action then pending therein between appellant as plaintiff, and said representatives of William Jennings and others as defendants;* or that in default of such joint conveyance appellant would convey said property to respondent, *after the final determination of said action* (between appellant and the Jenningses) *if this appellant should be decreed to be the owner thereof, on payment to this appellant by respondent of said sum of $42,500.* It further provided that in the event of such joint conveyance if respondent desired further time to pay said sum into court, appellant would consent to allow further time not exceeding one year, on satisfactory security given for such payment.

Thus it will be seen that under the plain letter and clear intent of the contract of July 9th, in the event of the representatives and successors in interest of William Jennings failing to join in the deed (and they did so fail) the Wasatch Mining Company was not required to make any deed until the final determination in its favor of the action against the Jenningses, nor until the Crescent Mining Company paid appellant $42,500. Here, according to the contract, the money was to be paid—not secured merely—before respondent would be entitled to demand any sort of a deed.

Now the complaint shows, (see record, close of first paragraph, p. 3) that the action mentioned in the contract is still pending. It not only fails to allege the payment or offer to pay said sum of $42,500, but it affirmatively shows that said sum has not been paid or tendered. (See record, 1st paragraph, p. 7.) The most careful scrutiny of this complaint must fail to discover the

allegation of any fact showing or tending to show that respondent is entitled to call for any deed from appellant.

If at the time of the commencement of this action respondent was entitled to a deed, it must be by reason of some other transaction—some contract between the parties other than that of July the 9th. If there was any other negotiation between the parties—any other contract under which respondent was entitled to call for a deed, it was bound to allege it in its complaint. Failing to do so, the court had no authority to render the decree that it did, no matter how convincing the evidence might be that respondent was entitled to a deed. But there is not so much as an intimation in the complaint that there was any other contract than the one already spoken of, or any other foundation for respondent's claim to the deed for which it has secured a decree.

In Crocket vs. Lee, 7 Wheaton, Marshall, C. J., speaking for the court, says: "No rule is better settled than that the decree must conform to the allegations. * * * The hardships of a particular case would not justify this tribunal in prostrating the fundamental rules of a court of chancery; rules which have been established for ages, on the soundest and clearest principles of general utility. If the pleadings in the cause were to give no notice to the parties or to the court of the material facts on which the right asserted was to depend; no notice of the points to which the testimony was to be directed, and to which it was to be limited; if a new case might be made out in proof, differing from that stated in the pleadings, all will perceive the confusion and uncertainty which would attend legal proceedings, and the injustice which must frequently take place."

Carmal vs. Banks, 10 Wheat. 181.
Harding vs. Handy, 11 Wheat. 103.
Harrison vs. Nixon, 9 Pet. pp. 483, 501, 504.
Foster vs. Goddard, 1 Black 506–518.
Ferguson vs. Ferguson, 2 N. Y. 360.

"No decree can be made in favor of a complainant on grounds not stated in his bill."

Bailey vs. Ryder, 10 N. Y. 363.

Mondran vs. Grix, 51 Cal. 151.
Dudley vs. Scranton, 57 N. Y. 424.

Nor is there anything in the answer to help out this defect in the complaint. The allegation in the answer is (see record p. 17): That no deed was ever made under the contract of July the 9th; that the deed of September 1st—the one it is sought to have reformed—was made pursuant to the modified bargain. (And it is entirely clear that it must have been pursuant to a modified bargain.) Was there anything in the modified bargain entitling respondent to the deed for which it secured this decree? Certainly not, so far as the answer discloses. For, according to the answer, the respondent already has the only deed to which it is, or ever can be entitled. But, in fact, the defect in the complaint could not be aided by the answer.

In Harrison vs. Nixon, *supra*, the Supreme Court of the United States says, on page 501: "Nor does the answer contain any averments of domicil, which supply these defects in the bill, *even if it could do so, as we are of opinion, in point of law, it could not.*

Every bill must contain in itself sufficient matters of fact, *per se*, to maintain the case of the plaintiff, so that the same may be put in issue by the answer and established by the proofs."

Schofield vs. Whitelegge, 49 N. Y. 259.
Tooker vs. Arnoux, 76 N. Y. 397.

In support of the first assignment of error we submit that if it were conceded that the complaint stated a case entitling the respondent to the relief granted, still there would have to be a reversal, because the court's findings are not within the issues presented by the pleadings.

The complaint prays a reformation of the deed in question on these grounds, to-wit: That it was the intention of the parties to the contract of July the 9th, 1886, to include therein the premises here in controversy; that to carry out that intention the deed of September 1st should have embraced these premises: but that by the fraudulent conduct of E. P. Ferry, while acting as respondent's agent, and certain officers and agents of the ap-

pellant, who were acting in concert and colluding with Ferry to cheat, wrong and defraud respondent, said deed was fraudulently drawn so as to exclude therefrom these same premises.

The court decrees a reformation of the deed as prayed; not however, on the grounds stated in the bill, namely that it had been fraudulently written, but on the ground of mistake, which ground is not so much as mentioned in the bill. Respondent has prevailed not on the case made by the bill, but on entirely different grounds. We were called upon to meet a case which, by the allegations of the complaint, was bottomed in fraud. Judgment was given against us upon a fact found by the court, to which fact the complaint utterly failed to challenge our attention.

A court of equity may reform a writing *inter partes* whenever, either through fraud or accident, or mistake, it has been so written as not to express the true agreement. But one may no more be permitted to allege actual, positive fraud as the ground for reformation, and obtain the relief on proof of mistake, than he may be permitted to allege a mistake as the ground for relief and recover on proof of actual fraud. This we understand to be elementary doctrine. It is abundantly settled by authority.

Respondent's counsel may, however, contend here, as they did on the final argument in the court below, that the allegations of fraud contained in the complaint do not constitute, and were not intended by the pleader to constitute, the basis of the respondent's right to have a reformation of the deed—that the allegations of fraud were designed solely to explain the delay of the respondent in commencing the action and to account for its failure sooner to discover the omission in the deed; that it appears from the complaint that respondent had a written contract, to-wit: the contract of July the 9th, which entitled it to a deed to the premises here in controversy; that the deed in question excludes these premises, and that these allegations alone constitute the basis of respondent's claim to the relief sought and obtained and are sufficient without any charge of fraud in the writing of the deed.

If we were to take them at their word—if we were to assume that the complaint does not, and was not intended to charge fraud in the making of the deed, as the foundation of

respondent's right to have it reformed, then it must follow that the complaint fails to state facts sufficient to entitle respondent to any relief whatever.

If this deed, to carry out the understanding and agreement of the parties, should have covered the premises in controversy here, its failure to do so must be the result of either fraud, accident, or mistake in drawing the deed so as to exclude them. If there was neither fraud, accident nor mistake in drawing this deed so as to exclude these premises, it necessarily follows that the deed is not erroneous, but must truly conform to the understanding and intention of the parties. Now, it will not be pretended that the complaint charges either accident or mistake, and if it does not charge fraud as the basis of the right to have the reformation sought, then it fails to show a case for reformation. It is not enough to entitle a party to a reformation of a deed, to show merely that there was a written contract between the parties for a deed for certain premises, and that months subsequently the deed which it is sought to have reformed was executed and delivered for a part only of the premises (and that, too, as here, upon different terms and conditions those specified in the contract.)

Because it will be presumed that the parties had consented to a modification of the first agreement, and that the later writing—the deed—truly expresses the final understanding of the parties. This presumption will prevail until it is overcome by proof, that, through either fraud, accident or mistake, the later writing was so drawn as not to conform to the true intention of the parties to it.

2 Parsons on Contracts, p. 548.
Legg vs. Goldwire, 1 Ld. Cas. Eq 13.

This being essential matter of proof, it must be necessary matter of allegation.

But in truth, the contention that actual, positive fraud is not the gist of the cause of action attempted to be stated in this complaint, is an after thought, which came to counsel only when they had made the attempt and utterly failed to establish the fraud alleged. It is a most palpable perversion of the manifest intention of the pleader who drew it. No lawyer, no court,

can read this bill and come to any other conclusion than that the intent was to set up actual, positive fraud in the making of the deed in question, as the foundation of respondent's asserted right to have it reformed.

If the court will undertake to eliminate from the complaint all the allegations of fraud, it will find when the task is completed that the remaining allegations fall far short of stating a case for any kind of relief.

Indeed, it will then appear that appellant executed and tendered the deed of September 1st as a fulfillment of its contract with respondent; that respondent's agent, Ferry, accepted the deed as a fulfillment of that contract, and that respondent acquiesced in such acceptance.

Now if there were neither fraud, accident nor mistake in the transaction, there is an end of the matter.

But there are other and uncontroverted facts in the case, from which it will be made to appear more clearly, if that be necessary, that it was quite indispensable to specifically allege and prove that there was either fraud, or accident, or mistake in drawing the deed in question so as to exclude the premises in dispute.

At the time of the making of the contract of July the 9th, and the deed of September 1st, the appellant derived title to the premises described in the deed by patents direct from the United States, and to the premises here in controversy it derived title through a deed from James Lowe and others, patentees of the Pinyon and Pinyon Extension claim. (This much appears from the complaint.)

So much of the language of the contract of July the 9th, and of the deed of September 1st, as it is necessary to quote in this connection is as follows: (From the contract.) "Said party of the first part * * * agrees with said second party, its successors and assigns, to join with the representatives and successors in interest of William Jennings, conveying to the said second party these two *patented* mining claims, situated in Uintah Mining District, and called the 'Walker and Walker Extension' and 'Buckeye' mining claims, in fee, according to the

contract heretofore made between said second party and William Jennings in his lifetime, on payment," etc.

See record, p. 12.

(From the deed) "Said first party * * * doth grant, bargain, etc., to said second party * * * those patented mining claims situate in Uintah Mining District, etc., named respectively the 'Walker and Walker Extension,' as described in patent from the United States to said first party, dated November 6th, 1874, and recorded in the office of the recorder of said county, in Book E, on pages 19 to 26; and also the 'Buckeye Mine,' as described in patent from the United States to said first party, dated November 6th, 1874, and recorded in the office of the recorder of said county, in Book E, on pages 27 to 34."

See record, p. 13.

We contend that the premises described in both these instruments is precisely the same, and that neither the contract nor the deed embraces the premises in dispute here.

The respondent, on the other hand, insists that the contract includes, and the deed excludes, *these premises* (the deed certainly excludes them, see deed record, page 13) where the description of the premises granted is as follows: "Those patented mining claims situate in Uintah Mining District, in said county and territory, named respectfully the Walker and Walker Extension Mines, as described in patents from the United States to said party of the first part, dated November 6th, 1874, and recorded in the office of the recorder of said county, in Book "E," on pages 19 to 26; and also the Buckeye Mine, as described in patent from the United States to said party of the first part, dated November 6th, 1874, and recorded in the office of the recorder of said county, in Book "E," on pages 27 to 34." (These patents, of course, did not embrace the area in controversy here, for that had been theretofore, in October, 1873, conveyed as a part of the Pinyon and Pinyon Extension. See complaint, record, page 2.)

But the respondent insists that the contract, Ex. "C," was intended to and does include said conflict area. The facts upon which respondent bases this contention are set out at length in its complaint, and are as follows, namely: That on the 8th of

March, 1883, the Jennings entered into the contract with respondent, being Ex. "B" to the complaint, and found in the record pages 10 and 11, and on the same date executed the deed to respondent, annexed to said complaint as Ex. "A."

Now, it will be remembered that the contract with appellant of July 9th, 1886, is: "To join with the representatives, etc., of William Jennings, conveying, etc., those *two patented* mining claims, situate, etc., called the Walker and Walker Extension and Buckeye, in fee according to the contract heretofore made between said second party and William Jennings in his lifetime." And the respondent charges in its bill, and now contends (see complaint, record, page 6), "That at the time of entering into said contract of July 9th, the parties acting in that behalf made application to the Deseret National Bank to see the Jennings contract—Ex. "B"—for the purpose of obtaining and inserting the full and exact description of the said property in said contract, but the said contract could not at the time be found, and it was thereupon referred to in said contract. Ex. "C," as the contract of William Jennings and the said Crescent Mining Company, * * and that reference to said contract of Jennings, Ex. "B," was for the purpose of effectuating and carrying out that intention, and in consequence of the fact that the said parties acting in that behalf did not at the time have in their possession a full and particular description of said property." The respondent, therefore, insists that we are bound by the description in the Jennings contract, as much so as though we had incorporated that description at length in our contract of July 9th.

Granting all that can be claimed therefrom, what is the result? Upon reference to the Jennings' contract, it is fonnd that it contains no description, but refers to the Jennings deed for the description of the premises. (See Ex. "B," Record p. 10.) And upon reference to this deed (Record pp. 8 and 9) we find that it contains two descriptions, one of which *includes* and the other of which *excludes* the premises in dispute. First it contains a description by courses and distances of a tract, the exterior boundaries of which includes the premises in dispute. Then follows this language: *"The said described premises being*

mineral entries Nos. 87 and 88, Lots 40 and 41, and patented as the 'Walker and Walker Extension' and 'Buckeye' mining claims."

Now this last description is in and of itself certain, definite and complete. If it stood alone in the deed, there would be no room for doubt as to the premises intended. And it is very certain that it does not include the premises here in controversy.

Now if the reference in the contract of July 9th to the Jennings contract was for the purpose of adopting the description in the Jennings deed, we ask which of these two descriptions was to be adopted? If the two descriptions in the Jennings deed had been incorporated at length in our contract of July the 9th—one *including*, the other *excluding* the premises in dispute and afterwards our deed of September 1st, passed between the parties, in which one of these descriptions is adopted: What, in the absence of evidence, would be the controlling presumption?

Why, surely that, that which was uncertain in the contract had been made certain by the deed. The parties to the contract must have intended to adopt one, and only one, of the descriptions therein contained; for the two are antagonistic, one *excludes* what the other *includes*. Now when the deed, afterward passed, is found to adopt one, only, of these two desriptions, does not the presumption arise that the description adopted by the deed was the one intended by the parties? That the deed conforms to the understanding and intention of the parties? This presumption must prevail until overcome by proof of fraud, accident or mistake. The deed necessarily conforms to the intention of the parties, unless it has adopted the wrong description. If it has adopted the wrong description, the error must have been the result of fraud, or of accident, or of mistake. The proof whereof could not be given unless alleged.

1 Ld. Cases Eq. 32-3, 4 Amer. from 4th London Ed.

From all that has gone before we submit that the complaint herein, containing as it does no suggestion of mistake or accicident, must have charged fraud in the making of the deed, in order to state a case for reformation. Further, that it has charged active, positive fraud, as the foundation of respondent's right to have the deed reformed, and that it obtained, as the

findings show, a decree for such reformation not on the ground of fraud, but on the ground of mistake—a ground not set up in the complaint. This is clearly error.

In Murcier vs. Lewis, 39 Cal., 533, it is said: "An allegation of actual fraud is not sustained by proof of a mistake." And the bill having charged fraud, the decree in plaintiff's favor on the ground of mistake was reversed as not warranted by the complaint, since the findings must be within the issues presented by the pleadings.

Devoe vs. Devoe, 51 Cal., 543.
Mondran vs. Grix., 51 Cal., 151.
Morenhout vs. Bowen, 42 Cal., 591.

In Eyn vs. Potter, 15 How. 42, Mr. Justice Daniel, speaking for the court, says, on p. 55 (after giving an analysis of the bill): "And here it may be proper to premise, that in the examination of the case made by the bill, it cannot be considered as one of constructive fraud, arising out of some peculiar relation sustained to each other by the complainant and the defendants, and therefore to be dealt with by the law under the necessity for protecting such relation, but it is one of actual, positive fraud, charged, and to be judged of according to its features and character, as delineated by the complainant, and according to the proofs adduced to establish that character. Although cases of constructive fraud are equally cognizable, by a court of equity, with cases of direct or positive fraud, yet the two classes of cases would be met by a defendant in a very different manner. *It seems to be an established doctrine of a court of equity, that when the bill sets up a case of actual fraud, and makes that the ground of the prayers for relief, the plaintiff will not be entitled to a decree, by establishing some of the facts quite independent of fraud, but which might of themselves create a case under a totally distinct head of equity from that which would be applicable to the case of fraud originally stated.*" See also Tufts vs. Tufts, 123 U. S., where it is said: "In a suit in equity for relief on the ground of fraud, it is enough if the facts found are not *materially and substantially* different from those alleged in the bill." Tillinghast vs. Champlin (4 R. I.) 67 Am. Dec. 510–514 to 525.

The case last cited contains an elaborate review of the authorities upon which the doctrine here contended for rests.

Price vs. Bennington, 7 Eng. L. & Eq. 260.
Curson vs. Berworthy, 22 Eng. L. & Eq. 1, 5, 7, 11.
Fisher vs. Bondy, 1 Curt. 297.
United States vs. San Jacinto Tin Co., 125 U. S. 273, 287, 288.

In Dudley vs. Scranton et al., 57 N. Y., page 424, it is said: "A cause of action based on fraud is distinct from that founded on mistake merely; and it is not competent upon the trial to make a substitution, one for the other." And it was held that where a defendant set up as a counterclaim a fraudulent omission, on the part of plaintiff, of items supposed by defendant to have been included in a settlement between the parties, which formed the basis for the agreement upon which the action was brought, it devolved upon defendant to establish the fraud, and a refusal of the court to submit to the jury the question whether the omission was by mistake was proper.

In McMichael vs. Kilmer, 76 N. Y. 36, it is held that where a complaint is for fraud, the action cannot be maintained on the ground of mutual mistake.

In discussing the second assignment of error, we have said all we desire to say in support of the third assignment of error.

Respectfully submitted,

CHARLES W. BENNETT,
Solicitor for Appellant.

148 U.S. 215

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IN THE SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1892.

THE WASATCH MINING COMPANY,
Appellant,
vs.
THE CRESCENT MINING COMPANY,
Respondent.
No. 135.

BRIEF OF RESPONDENT.

R. N. BASKIN,
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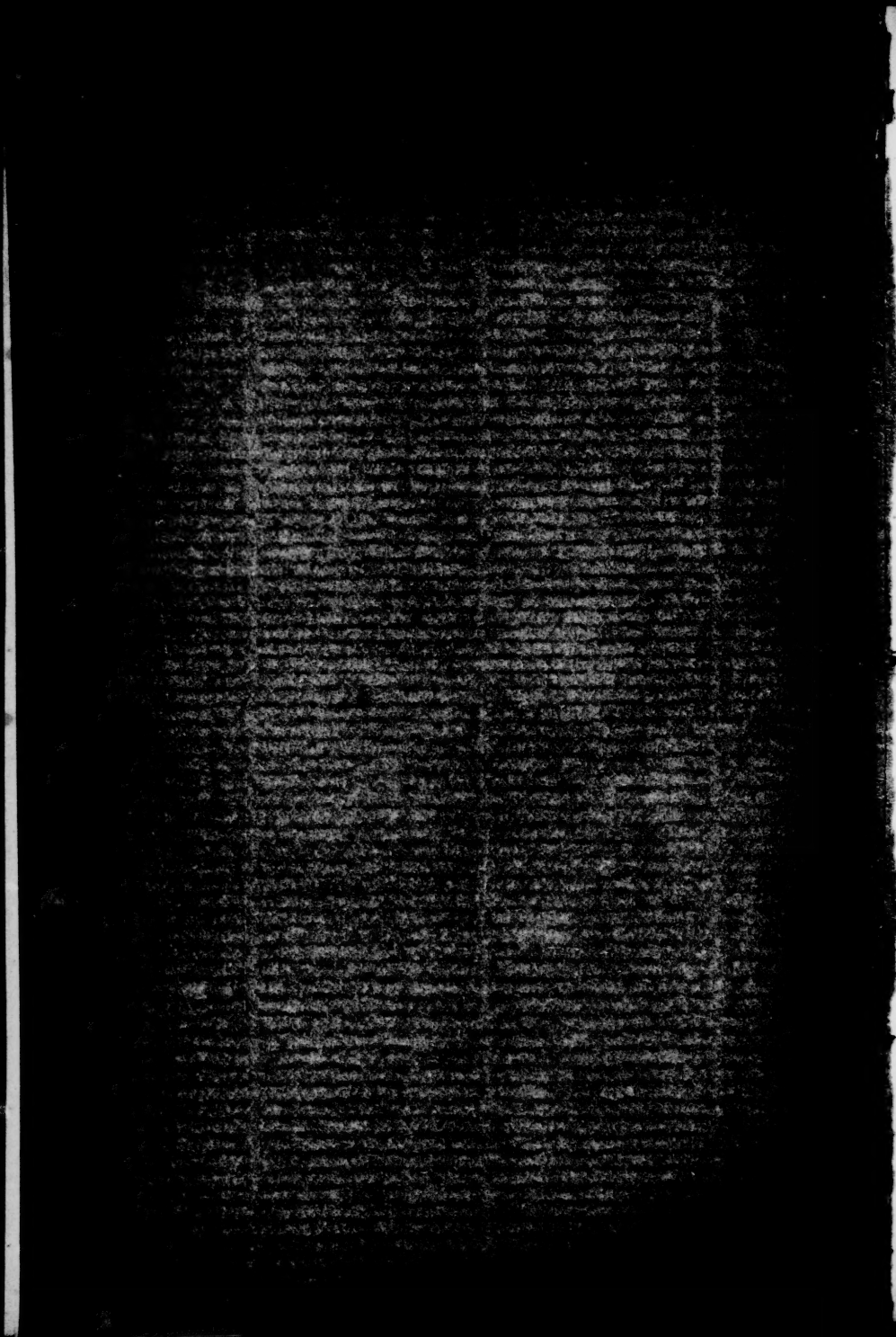
Of Counsel for Respondent.

CHARLES W. BENNETT,
Counsel for Appellant.



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THE WASATCH MINING COMPANY,
Appellant,
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Respondent.
No. 135.

BRIEF OF RESPONDENT.

Under the appeal in this case, the questions to be submitted are presented by the "Assignment of Errors," and arise on the pleadings and from the findings, and are narrowed down to small compass, and, as it seems to us, present but small scope for contention or doubt.

We will give to the Court a brief analysis of the pleadings in this cause, and endeavor to make clear the issues made by the pleadings, tried by the District Court, and the findings of said District Court approved by the Supreme Court of Utah.

Sections 340 and 341 of the Utah Code, relating to variances, mistakes in pleadings and amendments, are the same as those of California and New York, and full scope is allowed to parties to amend any pleading at any time during the trial or after verdict to enable them to fairly and fully present their case, or to cure any variance between pleadings and proofs.

Under the Utah Code, the rules of pleading are the same in equity as at law, and the plaintiff is entitled to any relief which the facts stated in the complaint entitle him to.

We contend that a careful inspection of the pleadings will disclose the fact that the findings are responsive to the issues.

The complaint sets forth the following facts:

First—That the appellant agreed in writing to convey to respondent the premises in dispute, and both parties so understood and intended. (Page 6 of Record.)

Second—That a deed was executed and delivered to E. P. Ferry, an officer of the plaintiff company, in pursuance of said contract, which plaintiff believed included the disputed property, and acquiesced in the acceptance of said deed under such belief. (Record, page 7.)

Third—That plaintiff did not discover that the disputed property was not embraced in said deed so accepted on its behalf until the day of the filing of this suit. (Record, 7.)

Fourth—That a mortgage of even date with said deed was given to secure the unpaid purchase money on the entire real property of plaintiff. (Record, page 7.)

In answer to these allegations the defendant alleges:

First—That the contract set out in Exhibit C was entered into by the parties, but denies that it was the intention of each or either of them to include the premises in dispute. (Record, page 16.)

Second—Admits the execution of the deed set out in Exhibit D; also the execution of the mortgage set out in Exhibit B of answer; but denies that said deed and mortgage were made upon or under the contract marked Exhibit C, but were made in pursuance of a modified bargain. (Record, page 17.)

Third—Denies that plaintiff was misled or deceived by Ferry's representations relating to said deed, or otherwise, or that plaintiff was misled or deceived *at all.* (Record, page 17.)

Fourth—Avers that said deed included all the property intended to be included therein, and all which was the subject of negotiation, and all that either party understood or supposed was to be included therein. Denies all conspiracy with Ferry to withhold, or that there had been withheld from plaintiff, any part of the premises negotiated for or agreed by appellant to be sold, and that appellant never negotiated with respondent for the sale of the premises in controversy. (Record, page 17.)

Aside from all question of fraud, an issue of mistake and inadvertence is clearly made by the pleadings. If the negotiations and contract of sale to respondent included the property in dispute, as alleged in the complaint, and the deed from the appellant was intended to convey the property so negotiated for and sold, and respondent, as alleged, accepted such deed under the belief that it included all the property so purchased, then it follows that the parties acted in the premises, aside from any consideration of fraud, inadvertently or through mistake.

And respondent further contends that if the complaint was uncertain, ambiguous or unintelligible, it was the duty (under the code practice) of the defendant to demur or move to make more certain, and it is now too late to raise such question.

We would also call the Court's attention to the exhibits A, B, C and D, set forth in the record, and to certain rules of construction of universal application in the consideration of such papers, which rules applied to the instruments in question, present very persuasive arguments in support of the affirmance of the decree herein.

The claim on our part to have the deed of appellant include the disputed property is based upon the written contract, Exhibit C. This contract is admitted by both parties; they differ only as to its effect. We claim that said contract is plain and certain, and no extrinsic evidence is required or admissible to aid in its construction, and that it clearly embraced the property in dispute. It bound the appellant to convey to the respondent "these two patented mining claims, situated in "Uintah mining district, Summit county, Utah Territory, *called* "the Walker & Walker Extension and Buckeye mining claims, "*in fee according to the contract heretofore made between said* "*second party* (*respondent*) *and William Jennings in his life* "*time* on payment, etc." (Record, page 12.)

The contract here referred to, as admitted by both parties, is Exhibit B. (Record, page 10.)

The said contract recites, "that whereas, the said second "parties (the Jennings) have sold, and by deed bearing even "date herewith, conveyed to said first party (the appellee) the "Walker & Walker Extension and Buckeye mining claims, "situated in Uintah mining district, Summit county, Utah "Territory, *more particularly described in said deed, and for* "*which purpose reference thereto is hereby made.*"

Said deed, Exhibit A, particularly describes the property

therein conveyed by metes and bounds, giving courses and distances to corners and monuments. *It is not denied that this particular description embraces and includes the property in dispute.*

Following the above description, the deed contains this: "The said *described* premises being mineral entries Nos. 87 and "88, lots 40 and 41, and patented as the Walker & Walker Ex- "tension and Buckeye mining claims, together with all dips, "spurs and angles, and also all metals, ores, gold and silver- "bearing quartz, rock and earth therein."

Where one deed refers to another for description of the granted premises, it is regarded of the same effect, and what is therein described will pass.

3rd Washburn on Real property, sec. 54 and cases cited.

The contract, Exhibit C, provides that the two patented mining claims *called* the Walker & Walker Extension and Buckeye shall be conveyed in fee, according to the Jennings contract, and that contract states that the Walker & Walker Extension and Buckeye are more particularly described in the Jennings deed, Exhibit A, for which purpose reference is made thereto. And by referring to said deed it is found that the said mining claims, as particularly described therein by corners, monuments, courses and distances, includes the premises in dispute.

Can there be any doubt but that by reason of the premises the respondent, under the contract with appellant, is entitled to a deed describing said mining claims as described in the Jennings' deed, and that a deed following the description of the Jennings' deed would pass to the grantee the disputed premises, and that the deed of the appellant sought to be reformed does not? The stipulation was for a conveyance of said mining claims according to the Jennings' contract. A deed containing the description of the Jennings' deed would be a conveyance in accordance with that contract; the deed executed and delivered is not.

But in answer to this the appellant, by its counsel, says that notwithstanding the Jennings' deed describes the Walker & Walker Extension and Buckeye by metes and bounds so as to include the disputed premises, said deed makes this further recital: "Said described premises being mineral entries No. 87 "and 88, lots 40 and 41, and patented as the Walker & Walker

"Extension and Buckeye," and "that therefore the description "by metes and bounds must be ignored, and that we must be "contented with a deed leaving out the premises in dispute;" a proposition in violation of every rule of construction, and preferring a general description over a special and specified one.

2d Devlin on Deeds, sec. 1038–1041.

A d ed, if possible, must be construed so that no part shall be rejected.

3rd Washburn on Real Property, page 398, sec. 37.
1st Addison on Contracts, 335.
Jackson v. Troup, 16 Johnson, 172.

If there are two descriptions in a deed of the land conveyed, and they do not coincide, the grantee is at liberty to elect that which is most favorable to him.

3rd Washburn on Real Property, 398, sec. 37.
100 Ill., 450, Sharp v. Thompson.
5 Met., 27, Melvin v. Projectors of Locks, etc.
24 Cal., 435, Vance v. Fore.

What rule of law can justify the mention in appellant's deed (under contract, Exhibit C) of that part of the description of Jennings' deed the least advantageous to the grantee and the exclusion of that most favorable to such grantee?

In the case now presented, the "findings of fact" in the District Court of Utah, when affirmed by the Supreme Court of Utah, are adopted by the last-named Court, and became the "findings" of that Court.

In the case of Stringfellow vs. Cain, 99 U. S., page 613, this Court, speaking by Chief Justice Waite, uses the following language:

"The act of April 7, 1874, (supra) provides that on appeals "to this Court from the Territorial courts, in cases where there "has been no trial by jury, instead of the evidence at large, a "statement of the facts of the case in the nature of a special "verdict, and also the rulings of the Court on the admission or "rejection of evidence where excepted to, shall be made and "certified by the Court below, and transmitted to this Court, "with the transcript of the proceedings and judgment or "decree.

"Under this act, if the findings of the District Court are "sustained by the Supreme Court, and a general judgment of "affirmance rendered the findings of the District Court, thus "approved by the Supreme Court, will furnish a sufficient " 'statement of the facts of the case for the purposes of an "appeal to this Court.

"We conclude, therefore, that the case is properly here for "decision upon the facts stated by the Supreme Court, and this "brings us to the inquiry whether, upon these facts, the judg-"ment appealed from was right."

The following are the "findings of fact" in the District Court, "so adopted by the Supreme Court of Utah. (See Record, page 22.)

FINDINGS OF FACT.

"In July, 1886, said plaintiff contracted to buy of defend-"ant, and defendant agreed to sell to plaintiff, for a valuable "consideration, the following described mining property and "premises, situated in Uintah mining district, Summit county, "Utah Territory, bounded, with magnetic variation at 17 degrees "and 20 minutes east, as follows, to-wit:

"Beginning at corner No. 1 of the Walker and Walker Ex-"tension mine, and running thence north 44 degrees 35 minutes "west 220 feet to corner No. 2 of said mine, from which U. "S. mineral monument No. 4 bears south 46 degrees 10 min-"utes west at a distance of 158 feet; thence south 21 degrees 15 "minutes west 196 feet to corner No. 3; thence south 68 de-"grees 5 minutes west 2,804 feet to corner No. 4; thence south "44 degrees 35 minutes east 216 feet to corner No. 5; thence "north 68 degrees 5 minutes east 1,410 feet to corner No. 3 of "the Buckeye mine; thence south 44 degrees 35 minutes east "along the southerly end line of said Buckeye mine 130 feet to "corner No. 4 thereof; thence north 68 degrees 5 minutes east "1400 feet to corner No. 1 of said last mentioned mine; thence "north 44 degrees 35 minutes west 130 feet to corner No. 2 of "said Buckeye mine, the same being also corner No. 6 of said "Walker and Walker Extension mine; thence north 21 degrees "15 minutes east 190 feet to the place of beginning, together "with all dips, spurs and angles, and also all metals, ores, gold and "silver bearing quartz, rock and earth therein, and all the rights, "privileges and franchises thereunto incident, appendant or

"appurtenant, or therewith usually had and enjoyed, and all "the estate, rights, title, interest and property, possession, "claim and demand of said party defendant in or to the same.

"2—In pursuance of said contract a deed was made by de- "fendant to plaintiff, bearing date September 1st, 1886; wherein "and whereby by mistake and inadvertence in describing the "property so contracted for and to be deeded, there was omitted "therefrom so much of said property and premises as had been "patented by the United States to James Lowe and others as "part of lot 42, called the Pinyon and Pinyon Extension mining "claim.

"3—That in making said contract and said deed it was the "intention of parties plaintiff and defendant to include the "premises and property omitted as last aforesaid, and the pur- "chase price thereof was paid and secured with that of the prop- "erty deeded.

CONCLUSIONS OF LAW.

"Plaintiff is entitled to have its deed from defendant so re- "formed as to embrace and include in its description of the "property to be conveyed all that which is described in the first "above finding of fact.

We present here the Errors assigned to the foregoing find- ings, to-wit:

ASSIGNMENT OF ERRORS.

"First. The Court erred in its statement or findings of "fact wherein it is stated and found that the deed bearing date "September 1st, 1886 (being the deed from the Wasatch Mining "Company to the Crescent Mining Company), was by mistake "or inadvertence so drawn as to omit therefrom the premises "which had been patented by the United States to James Lowe "and others as part of lot 42, called the Pinyon and Pinyon "Extension mining claim (being the premises secondly described "in the bill of complaint), because such statement or finding of "fact is not within the issues tendered by said complaint or made "by the pleadings. The complaint charges active fraud as the "basis for the relief prayed and charges and alleges in the most "direct and positive manner that the omission of said premises

"from said deed was due to a conspiracy between certain officers "and agents of the appellant (defendant below) and one E. P. "Ferry, an agent of the respondent (plaintiff below), to defraud "the plaintiff by omitting the same from said deed. Nowhere "in the complaint is there any intimation that such omission "was the result of mistake or inadvertence.

"Second. The Court erred in its statement or finding of "facts wherein it is stated and found that said deed was made in "pursuance of a contract between the parties of July, 1886, "(being the contract whereof a copy is annexed to the complaint "and marked Exhibit C).

"It is apparent on the face of said contract, Exhibit C, read "in the light of the allegations of the complaint, that said deed "could not have been made in pursuance thereof, because by "the terms of said contract, in default of the joint conveyance "therein provided for (and it appears from the complaint itself "that there was such default), no deed was to be given by the "Wasatch Mining Company to the Crescent Mining Company "until the suit mentioned in the contract should have been de- "termined in favor of said Wasatch Company, nor until the "Crescent Company should pay to the Wasatch Company the "purchase price, $42,500, and it appears from the complaint that "said suit was not yet determined, nor any part of said sum "paid or tendered, even at the time this action was commenced.

"Third. The Court erred in adjudging and decreeing that "the Wasatch Mining Company should forthwith, upon demand "therefor, execute and deliver to the Crescent Mining Company "a deed granting and conveying to the latter the premises de- "scribed in the decree (being the premises first described in "said complaint), because upon the face of the complaint it ap- "pears that at the time this suit was commenced the plaintiff "therein was not entitled to have or demand from defendant a "deed for any portion of the said premises. Plaintiff by its "complaint sought a reformation of said deed of September 1st "1886, (whereof a copy is annexed to said complaint and marked "Exhibit D,) so as to make it embrace all of the premises first "described in said complaint. From the complaint it appears "that the right to such relief was based upon the alleged fact "that by the contract of July, 1886, said Exhibit C, the parties "had contracted for a conveyance of all said premises, but "through fraud and collusion between agents of the defendant "and E. P. Ferry, an agent of plaintiff, that portion of said

"premises secondly described in the complaint was fraudulently "omitted from said deed. According to the allegations of the "complaint, it appears that the plaintiff's rights to any deed "must rest upon said contract, Exhibit C, while by the terms of "said contract, read in the light of the allegations of the com- "plaint, it appears that at the time this suit was commenced "plaintiff was not entitled to demand any deed, and this for the "reasons specified in the second assignment of error herein."

Referring to the first alleged "Error" so assigned, it seems to us that the position taken by the appellant is too narrow and circumscribed, while the complaint charges fraud and collusion on the part of its agent, "E. P. Ferry " and does not in so many words charge or set up mistake or inadvertence, yet the facts and circumstances set up, and the evidence offered and received *without objection*, constitute "mistake or inadvertence" as perfectly as if set up in clear and plain language and as if using those very words ; and with the findings of the Court below, before this Court, without the evidence, would it not be presumed that at the trial in the District Court the defendant had waived any such point (if any it had) as the one in this alleged Error assigned ?

But we contend that the complaint of the plaintiff in the Court below, while charging fraud, knowledge and collusion on the part of its agent, E. P. Ferry, yet it also clearly shows and charges the mutual intent of the parties in the deed sought to be reformed, to include therein all the property referred to, and the omission therefrom of the most valuable portion thereof through "mistake and inadvertence." It seems to us that the fraud charged by the complaint on E. P. Ferry is only one of the facts or circumstances by which the "mistake or inadvertence" of the parties was brought about, it was the cause or one of the causes, while the mistake or inadvertence was the effect.

It must be manifest to this Court, from the examination of the record herein, that it was the design and intention of the plaintiff to purchase, and the defendant to sell the whole of the Walker and Walker Extension and the Buckeye mining claims, especially in view of the references made to Exhibits A and B of the dealings of plaintiff with the Jennings's.

It will be further observed that the discoveries of both the said mining claims were included in the ground omitted from the description contained in the said deed.

Under such circumstances, would not the Courts treat the

complaint as sufficient and adequate after trial and judgment, without demurrer or objection to evidence ?

We confidently leave the first alleged "Error" to the judgment of the Court.

SECOND ERROR (Assigned).

While in the contract of July, 1886, (copy whereof is annexed to the complaint of plaintiff and marked Exhibit C,) certain conditions precedent to the delivery by the defendant to plaintiff of the defendant's deed for the properties described were provided for, yet the complaint of plaintiff clearly shows the waiver on the part of defendant of such conditions precedent, and the acceptance of other different and satisfactory terms in lieu of those embraced in Exhibit C. On page 13, of the record herein, will be found the following allegation in the complaint : "At the time of making said contract of July 9th, "1886, Exhibit C, the sum of $2,500 cash was paid by plaintiff to "defendant upon the consideration of the purchase of the prop- "erty so intended to be conveyed, and on the delivery of the "deed last aforesaid the payment of the remainder of said pur- "chase money, to-wit $42,500, was by a mortgage of even date "with said deed, given by plaintiff to defendant upon the entire "real property of plaintiff, of value greatly exceeding said last "mentioned sum fully secured to be paid."

And the said referred-to mortgage is made an Exhibit and annexed to the defendant's answer.

The said mortgage was not contemplated by Exhibit C, but evidently was accepted by the defendant in lieu of the conditions precedent and as equivalent to the provisions contained in Exhibit C.

After such acceptance of the said mortgage, it appears to us that appellant's alleged Error No. 2 seems somewhat out of point.

The pleadings in this case clearly show that the contract between the parties was modified, and that the defendant accepted the mortgage given by plaintiff in place of the terms stipulated, and thus waived conditions in its favor as provided in the contract.

It is clear that the deed from appellant to respondent was in performance of the contract, was so given and so accepted,

and is unanswerable and conclusive proof of performance of all conditions obligatory on respondent.

"A waiver may be said to occur whenever one in possession "of a right conferred either by law or by contract, and knowing "the attendant facts, does or forbears to do something inconsist- "ent with the existence of the right, or of his intention to rely "upon it; in which case he is said to have waived it, and he is "estopped from claiming anything by reason of it afterward."

Bishop on Contracts, Section 655, and cases cited.

"If the condition be to perform a certain thing by a certain "day, and the performance of another thing on another day be "accepted in place thereof, the strict performance of the con- dition will be waived."

7th Johnson's R. 476.
1st Shepley R. 69.
Story on Contracts, Sec. 32.

In the case at bar, the defendant executed and delivered the deed stipulated for in the contract, "Exhibit C," but in place of the money and other condition provided for therein, appellant accepted a mortgage, ample security for the money agreed to be paid: We would respectfully submit that defendant waived its rights under the provisions of the contract, and that the Supreme Court of Utah did not err in its second finding.

Again the Supreme Court of Utah, in referring to this question, on page 32 of the record, has well said:

"The defendant did not demur, but by its answer and cross- "complaint brought before the court all the facts, and no ob- "jection was taken to the evidence; under the circumstances, the "defendant should have raised the question in the court below "(the District Court) where ample power is given to correct and "amend the pleadings, and having itself brought the facts before "the court by its pleadings, and without objection gone to trial "on its merits, it would be too late to raise the question for the "first time in this court."

11 N. Y. 368, Catlin vs. Gunter.
20 N. Y. 524, Miller vs. Schuyler.
52 N. Y. 399, McKnight vs. Devlin.
23 Cal. 66, Marshall vs. Ferguson.
58 N. Y. 313, Tyng vs. Commercial Warehouse Co.

In the last case above referred to, the learned Judge, delivering the opinion of the court, used the following language: "No question appears to have been made during the trial in "respect to the production of evidence founded on any notion "of variance or insufficiency of allegation on the part of the "plaintiff. Had any such objection been made it might have "been obviated by amendment in some form or upon some terms "under the ample powers of amendment conferred by the Code "of procedure. It would, therefore, be highly unjust, as well as "unsupported by authority, to shut out from consideration the "case, as proved, by reason of defects in the statements of the "complaint. Indeed, it is difficult to conceive of a case in which "after a trial and decision of the controversy, as appearing on "the proofs, when no question has been made during the trial "in respect to their relevancy under the pleadings, it would be "the duty of a court, or within its rightful authority, to deprive "the party of his recovery on the ground of incompleteness or "imperfection of the pleadings. These principles we regard as "entirely settled."

THIRD ERROR (Assigned).

The question involved in this alleged "error" is, we think, fully covered in our answer to the second assignment.

Respectfully submitted.

R. N. BAŚKIN,

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Of Counsel for Respondent.

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In the Supreme Court of the United States,

October Term, 1892.

THE WASATCH MINING COMPANY, APPELLANT,
vs.
THE CRESCENT MINING COMPANY. } No. 135.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

MEMORANDUM OF STATUTES.

UTAH CODE.

Section 3236:

"Where the defense to an action is founded upon a written "instrument, and a copy thereof is contained in the answer, "or is annexed thereto, the genuineness and due execution of "such instrument are deemed admitted, unless the plaintiff "file with the clerk, within ten days after receiving a copy of "the answer, an affidavit denying the same, and serve a copy "thereof on the defendant or his attorney."

Section 3249:

"A material allegation in a pleading is one essential to the "claim or defense, and which could not be stricken from the "pleadings without leaving it insufficient."

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